TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 452

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

LE TOURNEAU COMPANY OF GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1944
CERTIORARI GRANTED NOVEMBER 6, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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INDEX

1 In United States Circuit Court of Appeals for the Fifth Circuit

No. 10954

LeTourneau Company of Georgia, petitioner

vs.

National Labor Relations Board, respondent

Petition for review

Filed February 24, 1944

LeTourneau Company of Georgia files this petition to review, vacate and set aside an order of National Labor Relations Board entered February 12, 1944, in the matter of LeTourneau Company of Georgia and United Steelworkers of America, CIO, case No. 10-C-1342, before said Board, and for grounds thereof says:

1. Upon the charge filed by United Steelworkers of America, CIO, October 13, 1943, the National Labor Relations Board issued its complaint against petitioner October 15, 1943, alleging that petitioner was a corporation engaged in manufacturing goods, the raw materials for which were obtained from various States, shipped to petitioner's plant at Toccoa, Georgia, and that petitioner sold its manufactured products in interstate commerce. The Board's complaint charged that petitioner had, at Toccoa, Georgia, within the jurisdiction of this Court engaged in
2 and was engaging in unfair labor practices affecting commerce within the meaning of § 8 (1) and (3) and § 2 (6) and (7) of the National Labor Relations Act.

2. In its answer petitioner admitted that it was engaged in manufacturing goods which it shipped in interstate commerce.

3. In substance the Board charged:

(a) That on or about April 8, 1943, petitioner suspended Grady Ferguson, an employee, for two days, and on or about July 16, 1943, it suspended L. Wayman Ayers, another employee, for a similar period because they had distributed Union literature outside its plant premises, joined and assisted the Union and engaged in concerted activities.

(b) That on or about August 11, 1943, petitioner by its Foreman LaBranch prohibited Union Literature being brought into its plant by employees, although it permitted other literature to be brought in said plant.

(c) That petitioner interpreted and enforced outside the plant fence a rule against distribution of literature and by suspending

Ferguson and Ayers violated § 8 (3) of the Act, and by all of the alleged conduct had interfered with, restrained and coerced its employees in the exercise of rights guaranteed in § 7 of the Act.

4. A hearing was had October 28, 1943, at Toccoa, Georgia, before William Feldesman, a Trial Examiner, designated
3 by the Board, during which petitioner moved to strike and dismiss from the complaint the charge indicated by subdivision (b) of paragraph 3 because there was no evidence offered in support thereof. This motion was granted by the Trial Examiner and acquiesced in by counsel for the Board and by the Union. At the conclusion of the hearing petitioner moved to dismiss the entire complaint. A ruling on this motion was then reserved, but it was subsequently granted by the Trial Examiner as shown by his intermediate report.

5. The Trial Examiner's report was filed November 11, 1943, and he thereby found that petitioner had not engaged in unfair labor practices and recommended that the Complaint be dismissed. Exceptions to this report were filed by the Union and the Board's Attorney. Upon request of the Union the Board granted oral argument which was had December 16, 1943, and thereafter on February 12, 1944, the Board reversed the report of the Trial Examiner and held that petitioner "by applying its no-posting-no-distributing rule to the distribution of Union literature by its employees on its parking lots," had "engaged in unfair labor practices within the meaning of § 8 (1) of the Act", and "by suspending Grady Ferguson and L. Wayman Ayers" petitioner had engaged in unfair labor practices within the meaning of § 8 (1) and (3) of the Act. That these acts "are unfair labor practices affecting commerce within the meaning of § 2 (6) and (7) of the Act."

6. The evidence demanded a finding that the rule against the distribution of literature in petitioner's plant and on its parking lots adjacent thereto was promulgated and enforced before any effort was made to organize a Union at its plant and with-
4 out any thought of discrimination against a labor union, and the Board in effect so found as will appear in its finding of facts to the effect:

"* * * it is uncontradicted in the record that, since July 3, 1941, the plant protection force has strictly enforced a no-distributing-no-posting rule on the respondent's premises, including the two parking lots. There is no evidence that either outsiders or employees have been permitted to distribute literature of any kind on the lots since that time." And further:

"We are of the opinion and find, as did the Trial Examiner, that the record does not support a charge that the rule was discriminatorily enforced against Ferguson and Ayers. It is undisputed that the rule against distribution has been applied to all persons without exception, seeking to distribute literature on parking lots where Ferguson and Ayers were apprehended."

7. The enforcement of the rule in question was both legal and necessary because:

(a) Petitioner employed more than two thousand people, many of whom came to their work in privately owned motor vehicles.

(b) It had graded and surfaced at great expense involving several thousand dollars, two parking lots for the use of these employees, where they daily parked between two and three hundred automobiles, in which wasleft lunches and other personal property of said employees for the protection of which it became necessary to employ guards in order to prevent pilfering and stealing of the personal belongings of said employees, and also to keep these parking lots free from litter.

(c) This rule was enforced from July 3, 1941, and there was no effort to organize a union at petitioner's plant until February, 1943.

(d) There was an election held at petitioner's plant under the direction of the Regional Director of the National Labor Relations Board having jurisdiction of the same on the question of whether its plant would adopt the Union or not, the result of which was more than two to one against the Union and this election was held April 8, 1943.

(e) If petitioner is forced by the order of the National Labor Relations Board to allow the distribution of labor union literature in its plant and on its two parking lots, then it cannot rightfully deny to other members of the public and its other employees the right to distribute other literature including that advocating a no-union and thereby create discord and dissatisfaction among its employees and deny the employees the protection afforded by its guards who are instructed to guard these parking lots and prevent loafing and pilfering thereon, as well as littering these lots and requiring additional help.

(f) The enforcement of an order requiring petitioner to allow the public to distribute literature indiscriminately in its plant and on its two parking lots constructed at great expense for the convenience of its employees and which constitute an essential facility for the operation of its plant, would be to deprive it of property without the process of law, contrary to the Fifth Amendment to the Constitution of the United States and if § 2 (6) and

(7) of the National Labor Relations Act, 49 Stat. 449, be so construed as to empower the National Labor Relations Board the right to order petitioner to permit the distribution of literature of any kind in its plant and on said two parking lots, which are immediately adjacent thereto and which constitute a necessary facility for the operation thereof, then said act is as so construed and applied, contrary to said Constitutional provision and is null and void.

(g). Petitioner not only had the right but under the provisions of said Act it was bound to be neutral between its employees on the question as to whether they would or would not form, join, or organize a labor union and not to discriminate in any manner with regard to hire or tenure of employment or any term or condition of employment and it is was bound not to encourage or discourage membership in any labor organization and to comply with this order would be to encourage its members to join a union whether it was of their own free will and accord or not.

(h) Petitioner had posted in its plant in conspicuous places notices to all of its employees that they had the right to join or not a union and that it would in no way interfere with said employees and to comply with this order would repudiate this notice.

8. Under the undisputed evidence in the record to the effect that petitioner had not discriminated against either of the two employees named and the Board's own finding to that effect, its order requiring petitioner to reimburse said employees for time lost and to allow the distribution of the Union literature on two parking lots constructed at the expense of petitioner which form a necessary facility for the operation of its manufacturing plant. the Board was without authority to make said order as entered and so doing was and is contrary to law, contrary to the evidence and without support in evidence and beyond the power of said Board.

9. There was no evidence that petitioner had ever interfered with the distribution of Union literature at the many homes constructed on its property and near its plant and occupied by employees.

10. Obedience to the order entered by the Board would require petitioner to pay out sums of money, though comparatively small that it probably could never collect back, even upon a holding by this Court that said order is illegal and to comply with other provisions of said order would involve a situation where it would be impossible to estimate the damage and harm that might occur.

Wherefore, petitioner prays that the National Labor Relations Board would be required to certify and send up a transcript of the entire proceedings in said case and that this Court reverse the order of said Board and direct that it be vacated and set aside.

That this petitioner act as a supersedeas to said order until the question can be by this Court determined.

CLIFTON W. BRANNON,
Toccoa, Ga.

C. M. MCCLURE,
Toccoa, Ga.

WHEELER, ROBINSON & THURMOND,
Petitioner's Attorneys.

[*Duly sworn to by Jack Salvador, jurat omitted in printing.*]

8 In the United States Circuit Court of Appeals
for the Fifth Circuit

Order to file petition

Filed February 24, 1944

(Title omitted.)

A petition for review of the order of the National Labor Relations Board entered on February 12, 1944, "In the Matter of LeTourneau Company of Georgia and United Steelworkers of America, CIO," Case No. 10-C-1342, N. L. R. B., having been presented to this Court,

It is Ordered that said petition be filed and docketed as of February 24th, 1944;

And it is further Ordered that a copy of this Order and said petition be forthwith served upon the National Labor Relations Board, and that said Board, upon service of such copies, forthwith certify and file in this Court a transcript of the entire record in the proceedings, in conformity to Rule 38.

(Signed) E. R. HOLMES,
United States Circuit Judge.

New Orleans, La., February 24th, 1944.

9 In the United States Circuit Court of Appeals
for the Fifth Circuit

Answer of National Labor Relations Board to petition to review and set aside an order of the National Labor Relations Board and request for enforcement of the said order

Filed March 27, 1944

(Title omitted.)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now the National Labor Relations Board, and, pursuant to the National Labor Relations Act (49 Stat. 449, U. S. C. Supp.

V, Title 29, Sec. 151, *et seq.*), files this answer to the petition to review and set aside an order of the National Relations Board and this request for enforcement of the said order heretofore issued against petitioner.

1. Answering the allegations contained in paragraphs 1 to 6 and 9, of the petition, the Board prays reference to the certified transcript of the entire record of the proceedings before the Board, filed herein for a full and exact statement of the pleadings, evidence, rulings of the Trail Examiner, Intermediate Report, findings of fact, conclusions of law, and Order of the Board, and all other proceedings had in said matter before the Board.

2. The Board denies each and every allegation of error contained in paragraphs 7, 8, and 10 of the petition. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and Order were and are in all respects valid and proper under the National Labor Relations Act and the Constitution of the United States.

Wherefore, having answered each and every allegation contained in the petition to review, the Board prays this Honorable Court that said petition be denied.

Further answering, the Board, pursuant to Section 10 (e) and (f) of the National Labor Relations Act, respectfully requests this Honorable Court for the enforcement of the Order issued by the Board in the proceedings instituted by it against petitioner, LeTourneau Company of Georgia said proceedings being designated on the records of the Board as Case No. 10-C-1342, the title thereof being "In the Matter of *LeTourneau Company of Georgia* and *United Steelworkers of America, CIO.*"

In support of this request for the enforcement of its said Order, the Board respectfully shows as follows:

(a) Petitioner is a Georgia corporation qualified to do and engaging in business in the State of Georgia, within this judicial circuit. This Court has jurisdiction of the petition to review herein and of this request for enforcement by virtue of Section 10 (e) and (f) of the National Labor Relations Act.

(b) Upon proceedings had in said matter before the Board, as more fully shown by the certified transcript of the entire record thereof, filed herewith, to which reference is hereby made, the Board on February 12, 1944, duly stated its findings of fact and conclusions of law and issued an Order directed to petitioner, its officers, agents, successors, and assigns. The aforesaid Order provides as follows:

11 ORDER

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Re-

lations Act, the National Labor Relations Board hereby Orders that the respondent, LeTourneau Company of Georgia, Toccoa, Georgia, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, CIO, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Rescind immediately the rule against distribution of literature insofar as it prohibits distribution of union literature by employees outside the gates of the plant and in the parking lots;

(b) Make whole Grady Ferguson and L. Wayman Ayers by payment to them of a sum of money equal to that which they would have earned on the respective days they were suspended from work, namely April 9 and 10, 1943, in the case of Ferguson, and July 17 and 19, 1943, in the case of Ayers; less their respective net earnings during such period;

(c) Post immediately in conspicuous places throughout its Toccoa, Georgia, plant, and maintain for a period of at least sixty (60) consecutive days, notices to its employees stating that the respondent will not engage in the conduct from which it is Ordered to cease and desist in paragraphs 1 (a) and (b) hereof; that it will take the affirmative action set forth in paragraphs 2 (a) and (b) hereof; and that the respondent's employees are free to become and remain members of United Steelworkers of America, CIO, and the respondent will not discriminate against any of its employees because of membership in or activity on behalf of that organization;

(d) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(e) Thereafter, on February 12, 1944, the decision and Order herein was duly served upon petitioner and upon United Steelworkers of America, CIO. Said decision and Order is in full force and effect.

(d) Pursuant to Section 10 (e) and (f) of the National Labor Relations Act, the Board is certifying and filing with this Court herewith the transcript of the entire proceedings before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and Order of the Board.

Wherefore, the Board respectfully prays this Honorable Court that it causes notice of the filing of this answer and request for enforcement and of the filing of the transcript to be served upon petitioner and that this Court take jurisdiction of the proceedings and of the questions determined therein, and make and
13 enter upon the pleadings, testimony and evidence, and proceedings set forth in the transcript and upon so much of the Order made thereon as relates to the proceedings set forth in paragraph (b) hereof, a decree denying the petition to set aside the Order of the Board and enforcing said Order and requiring petitioner, its officers, agents, successors, and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
By (S) MALCOLM F. HALLIDAY,
Malcolm F. Halliday.
Associate General Counsel.

Dated at Washington, D. C., this 22nd day of March, 1944.

[*Duly sworn to by Malcolm F. Halliday jurat omitted in printing.*]

14 Before the National Labor Relations Board Tenth Region

Case No. 10-C-1342.

In the Matter of LETOURNEAU COMPANY OF GEORGIA (name of company) *and* UNITED STEELWORKERS OF AMERICA, CIO (name of charging party)

First amended charge

Filed October 13, 1943,

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that LeTourneau Company of Georgia (Full name of company) at Toccoa Georgia, (Address of establishment), employing 2100 (Number) workers in manufacture of road machinery and shells (Type of business), has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (3) of said Act, in that: (1) It suspended L. Wayman Ayers on or about July 16, 1943, and

Grady Ferguson on or about April 8, 1943, because said Ayers and Ferguson had distributed handbills for the United Steelworkers of America outside of the company's gates;

(2) The company, through the foreman of its machine shop prohibited the carrying of union literature onto company property by any of its employees while permitting employees to carry other literature into the plant;

15 (3) It interfered with, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

UNITED STEELWORKERS OF AMERICA, CIO.
By ARCHIE W. GRAHAM,
Archie W. Graham,
Field Representative,
246 Mortgage Guarantee Building, Atlanta, Georgia.

Subscribed and sworn to before me this 13th day of October 1943, at Atlanta, Georgia.

PAUL S. KUELTHAU,
Paul S. Kuelthau,
Regional Attorney, NLRB.

16 Before the National Labor Relations Board
Tenth Region.

Case No. 10-C-1342

In the Matter of LETOURNEAU COMPANY OF GEORGIA *and* UNITED STEELWORKERS OF AMERICA, CIO

COMPLAINT

It having been charged by United Steelworkers of America, CIO, 75 Ivy Sreet, N. E., Atlanta, Georgia, hereinafter referred to as the Union, that LeTourneau Company of Georgia, Toccoa, Georgia, hereinafter referred to as respondent, has engaged in and is now engaging in certain unfair labor practices affecting

commerce, as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, hereinafter referred to as the Board, by the Acting Regional Director for the Tenth Region as agent for the Board, designated by National Labor Relations Board Rules and Regulations—Series 2, as amended, Article IV, Section 1, hereby issues its complaint and alleges as follows:

I. Respondent is and has been since December 1938, a corporation duly organized under and existing by virtue of the laws of the State of Georgia. It is engaged in the manufacture and sale of earth moving machinery and specialty machines at its plant near Toccoa, Georgia.

II. Respondent, in the course and conduct of its business, causes and has continuously caused a substantial amount
17 of raw materials and supplies to be purchased and delivered to its plant at Toccoa, Georgia, from and through the States of the United States other than the State of Georgia.

III. Respondent, in the course and conduct of its business, causes and has continuously caused a substantial amount of the products manufactured and sold by it to be delivered and transported from its plant at Toccoa, Georgia, to and through States of the United States other than the State of Georgia.

IV. United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization within the meaning of Section 2, subdivision (5) of the Act.

V. On or about April 8, 1943, the respondent suspended Grady Ferguson for two days, and on or about July 16, 1943, suspended L. Waymann Ayers for two days.

VI. The suspension described above in paragraph V took place because said Ferguson and Ayers had been distributing literature published by the Union outside the plant premises and because said Ferguson and Ayers joined and assisted the Union and engaged in concerted activities with other employees for their mutual aid and protection.

VII. The respondent, on or about August 11, 1943, through the foreman of its machine shop, one LaBranch, prohibited the
18 bringing of union literature into the plant by employees of said machine shop although it permitted other literature to be brought into the plant.

VIII. By the acts described above in paragraphs V and VI, the respondent did discriminate and is discriminating in regard to the hire or tenure or terms or conditions of employment of Grady Ferguson and L. Wayman Ayers thereby discouraging membership in the Union, and respondent did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subdivision (3) of the Act.

IX. By the acts described above in paragraphs V, VI and VII, and by each of said acts, respondent did interfere with, restrain and coerce and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subdivision (1) of the Act.

X. The activities of respondent described above in paragraphs V, VI and VII, occurring in connection with the operations of respondent described above in paragraphs I, II and III, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XI. The acts of respondent, described above, constitute unfair labor practices affecting commerce within the meaning
19 of Section 8, subdivisions (1) and (3), and Section 2, subdivisions (6) and (7) of the Act.

Wherefore, the National Labor Relations Board on the 15th day of October, 1943, issues its complaint against LaTourneau Company of Georgia, respondent herein.

Before the National Labor Relations Board

Tenth Region

Case No. 10-C-1342

In the Matter of LeTourneau Company of Georgia *and* United Steelworkers of America, CIO

Notice of hearing

Please Take Notice that on the 28th day of October, 1943, at 10 o'clock in the forenoon, at the Stephens County Court House, Toccoa, Georgia, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the Acting Regional Director for the Tenth Region, with offices at
20 300 Ten Forsyth Street Building, Atlanta, Georgia, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint, within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or

motion, the Trial Examiner, in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Acting Regional Director for the Tenth Region on this 15th day of October, 1943.

[SEAL] PAUL S. KUELTHAU,
Acting Regional Director, National Labor Relations Board.

Before the National Labor Relations Board
Tenth Region

In the Matter of LETOURNEAU COMPANY OF GEORGIA *and* UNITED STEELWORKERS OF AMERICA, CIO

Affidavit as to service

STATE OF GEORGIA,
County of Fulton, ss:

I, Mrs. Christine Davis, being duly sworn, depose and say that I am an employee of the National Labor Relations Board,
21 in the Tenth Region at Atlanta, Georgia; on the 15th day of October, 1943, I served by postpaid registered mail, bearing Government frank, a copy of Amended Charge, dated October 13, 1943, Complaint and Notice of Hearing, dated October 15, 1943, in the above stated matter to the following named persons, addressed to them at the following addresses:

LeTourneau Company of Georgia,
Toccoa, Georgia

United Steelworkers of America, CIO
210 Mortgage Guarantee Building
Atlanta, Georgia

MRS. CHRISTINE DAVIS.

Subscribed and sworn to before me this 16th day of October, 1943.

MARY E. KELSEY,
Designated Agent, NLRB.

Post Office Department

Official Business

Penalty for Private Use to Avoid Payment of Postage, $300.
Postmark of Delivering Office: Atlanta, Ga., Oct. 18, 1943, 5:30 P. M.
Return to National Labor Relations Board, Tenth Region.
(Name of Sender)
22 Street and Number or Post Office Box, 300 Ten Forsyth Street Building.

Atlanta, Georgia

Registered Article No. 435519

Insured Parcel No.

Received Oct. 19, 1943, 8:45 A. M., National Labor Relations Board, Tenth Region.

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

UNITED STEELWORKERS OF AM.,
(Signature or name of addressee)

B. NICHOLAS.
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above.)

Date of delivery 10-18-1943.
10-C-1342 union chg. comp. nofh.

Post Office Department

Official Business

Penalty for Private Use to Avoid Payment of Postage, $300.
Postmark of Delivering Office: Toccoa, Ga., Tournapull Rur. Sta., Oct. —, 1943, 10 A. M.
23 Return to National Labor Relations Board, Tenth Region.
(Name of Sender)

Street and Number or Post Office Box, 300 Ten Forsyth Street Building.

Atlanta, Georgia

Received Oct. 19, 1943, 8:45 A. M., National Labor Relations Board, Tenth Region.

Registered Article No. 435520

Insured Parcel No. ---------

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the fact of this Card.

LeTourneau Co. of Ga.
(Signature or name of addressee.)
James F. Haynes.
(Signature of addressee's agent—Agent should enter addressee's name on line ONE above.)

Date of delivery 10-18-1943.
10-C-1342 company chg. comp. nofh.

Before the National Labor Relations Board
Tenth Region

Case No. 10-C-1342

In the Matter of LeTourneau Company of Georgia *and* United Steelworkers of America

Answer of respondent

Comes now LeTourneau Company of Georgia and files this its answer and plea to the charge made against it by the National Labor Relations Board in the above styled case and for grounds thereof says:

1. In answer to paragraph one, this respondent is and has been since December, 1938, a corporation duly organized under and existing by virtue of the laws of the State of Georgia. It is engaged in the manufacture and sale of earth-moving machinery.

2. The respondent admits the statements contained in paragraphs two and three.

3. This respondent is without knowledge or information sufficient to form a belief as to the truth of the averment contained in paragraph four.

4. The statement contained in paragraph five is substantially correct.

5. This respondent denies the statements contained in paragraph six.

Grady Ferguson was found distributing literature on the premises of respondent where its employees were accustomed to

park from 275 to 380 automobiles per day, in many instances leaving in them their personal belongings. Until respondent adopted a strict rule of supervision thefts occurred and property was lost, causing confusion and dissatisfaction among the employees as well as to create a vast amount of circulars and advertising literature of all kinds to be cleaned up from the premises and place an unnecessary burden on the Company. For this and other reasons respondent had long before it had any knowledge of an effort to organize a union of any of its employees, promulgated a rule forbidding the placing of handbills, placards, posters, or advertising matter of any kind on company property without permission of the personnel manager. A violation of this rule was the basis for the suspension of Grady Ferguson.

In case of L. Wayman Ayres, this employee approached a foreman and asked permission to circulate handbills on company property and use the bulletin boards within the plant. He was informed that it was against company policy of long standing, to do the thing he desired and that he could not be given the permission requested. In direct violation of this well-established policy he proceeded to distribute literature and was suspended for two days. It was the policy of respondent to forbid the dis-
26 tribution of literature of any kind on its premises or in its place for various reasons. Respondent was at the time engaged in the manufacture of essential war ammunition materials for use by the United States Government, and it employed approximately 2100 people, many of these operating complex, delicate and expensive machines and these operators were of necessity required to be on the alert in the supervision of these machines while on duty. On several occasions operators had been reading literature and in some instances serious accidents were narrowly avoided due to this disposition on the part of some employees. The safety of employees as well as efficient operation required the prohibition of reading matter of any kind being distributed in the plant beyond such written instructions necessary for the manufacture and production of the article or articles upon which an employee was engaged. The policy adopted by the Company had no reference to union literature or any other type of literature and was adopted and enforced without regard to whether the literature was religious or of any other kind or character and without discrimination in favor of or against any person or organization.

6. This respondent denies the allegations contained in paragraph seven.

7. The statements contained in paragraph eight are denied.

8. Respondent denies the allegations contained in paragraph nine.

9. Respondent denies the allegations contained in paragraph ten.

27 10. Respondent denies the allegations contained in paragraph eleven.

11. By way of further defense this respondent avers that as far back as April 1, 1943, it posted in its plants on its bulletin board and at conspicuous places a notice a copy of which is hereto attached marked Exhibit A and by reference made a part of this answer and plea. Its policy has been from the beginning of its operation to recognize the right of its employees to organize, form, join or assist labor organizations without any interference upon its part or the part of any of its officers. It has never discriminated in favor of or against any employee because he or she was or was not a member of a union, but on the contrary it has at all times left to its employees absolute freedom of choice with reference to such matters.

Wherefore, respondent prays that the charge be dismissed and that it be exonerated.

LeTOURNEAU COMPANY OF GEORGIA,
By JACK SALVADOR,
Vice-President-General Manager.
CLIFTON W. BRANNON,
Toccoa, Ga.
C. M. McCLURE,
Toccoa, Ga.
WHEELER, ROBINSON & THURMOND,
Attorneys for Respondent.
Gainesville, Ga.

28 * [*Duly sworn to by Jack Salvador jurat omitted in printing.*]

Exhibit "A" to Answer

APRIL 1, 1943.

To all foremen, employees and bulletin boards:

This company desires to inform each of its employees of a definite fixed policy which it does and will adhere to.

Any statement or rumors by any persons contrary to the policy stated herein are without authority and are hereby repudiated.

The employees of this company have the right to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and this company

will not interfere with, restrain, or coerce any employee in his or her exercise of these rights.

The company will not undertake or permit any interference, aid or restraint of its employees in the exercise of
29 their right of self-organization and concerted activities for the purpose of collective bargaining or other mutual aid and protection mentioned above.

This company does not, neither will it discriminate in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization.

This company seeks at all times to be ready and willing to cooperate with our employees, or their representatives, for the mutual benefit of our company, our employees, and our country.

LeTourneau Co. of Georgia,
Jack Salvador,
Vice Pres.-General Manager.

Before the National Labor Relations Board
Trial Examining Division
Washington, D. C.

Case No. 10-C-1342

In the Matter of LeTourneau Company of Georgia *and* United Steelworkers of America, CIO

Order for correction of errata in transcript of testimony

An examination of the transcript of the record of the testimony in the above-entitled matter, by the undersigned, has re-
30 vealed the existence of certain errata therein. In order to conform the transcript to the testimony actually given,

It is hereby Ordered that said transcript be corrected in accordance with the list of corrections attached hereto and made part hereof, and Sara Gamm, Supervisor of Administrative Statistics and Record Section, for the National Labor Relations Board, is hereby authorized and directed physically to enter said corrections on the face of the transcript of the record on file with the National Labor Relations Board.

William Feldesman,
William Feldesman,
Trial Examiner.

Dated: November 9, 1943.

LIST OF CORRECTIONS

Page	Line	Record shows	Should be
13	11	Mr. Brannon.	Mr. Wheeler.
	17	Mr. Brannon.	Mr. Wheeler.
	19	Mr. Brannon.	Mr. Wheeler.
	22	Mr. Brannon.	Mr. Wheeler.
25	21	clarify up	clarify
89	1	as part of,	any part thereof as
144	11	Is this the contention by	Is it the contention of
158	9	Q. In other words,	In other words,
166	15	is striking	is not striking
176	24	quite	quote
185	11	Exhibit 7,	Exhibit 7,
	12	the paragraph "C" headed "Parking".	I offer paragraph "C", headed "Parking", of Exhibit 6
	13	I offer Exhibit 6	Deleted
208	17	Tabe &	Tabin-
219	4	practfeally	property
220	23	for union literature.	for distributing union literature.
221	10	the Picker	the Tabin-Picker
	12	the plants, a certain	the plant, and a certain
	17	Tabe &	Tabin-
	22	Tabe & Picker case was in	Tabin-Picker case was "in
	23	and orderly.	and-orderly".
227	19	Mr. Kuelthau?	Mr. Wheeler?
	20	Mr. Kuelthau.	Mr. Wheeler.
	21	Mr. Wheeler	Deleted
234	25	Section 321,	Section 32,
242	24	from there on	will bear or

Before the National Labor Relations Board

Trial Examining Division

Washington, D. C.

In the Matter of LeTourneau Company of Georgia *and* United Steelworkers of America, CIO

Case No. 10–C–1342

Mr. Paul S. Kuelthau, for the Board.

Wheeler, Robinson, and Thurmond, by Mr. Alonzo C. Wheeler, and Mr. Emory F. Robinson, of Gainesville, Ga.; and Mr. Clifton W. Brannon, and Mr. C. M. McClure, of Toccoa, Ga., for the Respondent.

Mr. Archie W. Graham, of Atlanta, Ga., Field Representative, for the Union.

Intermediate report

Statement of the Case

Upon a first amended charge duly filed October 13, 1943, by United Steelworkers of America, CIO, herein called the Union.

33 the National Labor Relations Board, herein called the Board, by its Acting Regional Director for the Tenth Region (Atlanta, Georgia), issued its complaint dated October 15, 1943, against LeTourneau Company of Georgia, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint, as amended at the hearing, alleged in substance that the respondent: (1) on or about April 8, 1943, suspended Grady Ferguson for 2 days, and on or about July 16, 1943, suspended L. Wayman Ayers for a similar period for the reasons that Ferguson and Ayers had distributed union literature outside the plant premises, joined and assisted the Union, and engaged in concerted activities; (2) on or about August 11, 1943, by Foreman LaBranch of the machine shop, prohibited union literature from being brought into its plant by employees of the machine shop, although it permitted other literature to be brought into its plant; (3) interpreted and enforced "the rule against distribution of literature outside of the plant fence";[1] and (4) by suspending Ferguson and Ayers violated Section 8 (3) of the Act, and by said suspensions and all the foregoing conduct violated Section 8 (1) of the Act. On October 26, 1943, the respondent filed its answer admitting that it had suspended Ferguson and Ayers, but denying that it had engaged in any of the unfair labor practices alleged.

Pursuant to notice, a hearing was held at Toccoa, Georgia, on October 28, 1943, before William Feldesman, the under-
34 signed Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel, the Union by its Field Representative, and all participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. In the course of the hearing, the undersigned granted, without objection, a motion of counsel for the respondent to strike from the complaint for failure of proof the averment concerning the alleged conduct of Foreman LaBranch. Near the close of the hearing, the undersigned granted, without objection, motions to conform the complaint and answer to the proof, with respect to names, dates, and other minor variances. At the same time ruling was reserved

[1] At the hearing, counsel for the Board moved to amend the complaint by adding this allegation. The motion was granted

upon a motion of the respondent's counsel to dismiss the complaint. It is disposed of as indicated in the recommendations below.

Oral argument, in which counsel for the Board and the respondent participated, was thereafter had upon the record. Although the parties were advised of their right, upon request made before the close of the hearing, to file briefs with the undersigned, none took advantage of the opportunity offered.

Upon the entire record thus made, and from his observation of the witnesses, the undersigned makes, in addition to the above, the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The respondent, a Georgia corporation created in 1938, is engaged at its plant in a town three miles northeast of Toccoa, Georgia, in the manufacture and sale of earth moving machinery, specialty machines, shells and other products essential to the war effort. In 1942 the respondent purchased $3,932,420.55 worth of raw materials, almost all of which were shipped to its plant from points outside the State of Georgia. In the same year the respondent sold finished products amounting to $6,746,525.10 in value, more than 80 per cent of which was shipped from its plant to points outside the State of Georgia.

II. THE ORGANIZATION INVOLVED

United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES [2]

A. *The Suspensions of Grady Ferguson and L. Wayman Ayers; Alleged Interference, Restraint, and Coercion*

1. Sequence of Events

The respondent's plant is situated on the north side of U. S. Highway No. 13 in a town 3 miles northeast of Toccoa, Georgia. An intersecting roadway divides the plant premises into two sections. Enclosing the plant premiss is a 6-foot link wire fence,

[2] The findings in this section are based upon undisputed and, in some instances, correlated testimony of witnesses for the Board and the respondent, as well as documentary evidence.

surmounted by two strands of barbed wire, which extends, separated into two parts by the intersecting roadway, for approximately 1,000 yards along U. S. Highway 13. The land between the fence and U. S. Highway 13 is owned by the respondent. The main gate is located in the east section of the plant premises.

36 Virtually all of the respondent's employees must pass through the main gate in order to report for and finish their daily work. Close by the main gate is the respondent's office. In front of the main gate and office is a concrete parking lot [3] which extends to the north shoulder of U. S. Highway 13. Across the highway, opposite the concrete lot, is a sand and gravel parking lot [4] which reaches to the south shoulder of the highway. Of the respondent's 2,100 employees who possess automobiles, approximately 60 per cent park their vehicles in the north lot, and about 30 per cent park in the south lot. Buses stop at a reserved space within the north lot.

Since 1938, the north lot has been utilized for parking space by the respondent's employees, although it was for a time in an unpaved state. Before 1942, in permissible weather, some of the respondent's employees parked their cars on the south shoulder of U. S. Highway 13, opposite the north lot; at that time the south lot was not in existence. In 1941 the respondent leased from a subsidiary corporation the site of the south lot, and in the ensuing year cleared and placed the land in its present condition. Both lots are maintained and kept clean by the respondent at its expense for the benefit of its employees. As part of their duties guards employed by the respondent keep both lots under surveillance.

Approximately 6,000 acres of land are owned by the respondent and its subsidiary corporation in and about the respondent's plant, and the respondent also owns about 50 homes, in which a number of its employees reside. The respondent's employees live within a radius of 20 miles from the plant.

At the end of February, 1943, the Congress of Industrial Organizations [5] started to organize the respondent's em-

37 ployees. L. Wayman Ayers, an employee of the respondent for approximately 4 years, became interested in the CIO about March 15. On April 1, the respondent posted in conspicuous places in its plant a notice stating in general terms the rights of its employees under the Acts and declaring the respondent's intention not to violate or permit interference with such

[3] Referred to herein as the north lot.
[4] Referred to herein as the south lot.
[5] Referred to herein as the CIO.

rights.[6] An election was held on April 8, under the auspices of the Board, with the CIO on the ballot. After he had finished work on the day of the election, and before the polls had closed, Grady Ferguson, who has been in the respondent's employ for about 2 years, entered a bus which was parked in the north lot, found some CIO handbills, distributed several to people present in the bus, and handed 4 or 5 through a window to persons standing on the lot. George M. Stokes, captain of the respondent's guard, observed Ferguson handing literature through the bus window. At Stokes' request, Ferguson accompanied him to the guardhouse. Stokes unsuccessfully attempted to communicate with Plant Manager Joe Salvador, and directed Ferguson to speak to Salvador the following day. Concerning what transpired the next morning with Salvador, Ferguson testified: "I went in that morning, and he said he would have to lay me off, because he had done that before, and he said he would have done the same thing if it had been a chicken sale, or something like that, advertising of any kind." Ferguson was suspended from his work for April 9 and 10.

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The CIO lost the election of April 8. Thereafter, the Union, an affiliate of the CIO, continued the organizing campaign. Ayers became a member of the Union on about May 15, and was elected its local's president about July 9. In the evening of July 15, Ayers finished his work, sought out Plant Manager Salvador, and requested permission to distribute and post about the plant handbills announcing a union meeting for July 17. Salvador answered, as Ayers testified, that "* * * they might get in trouble if they were to let the gap (sic) down and give [Ayers] permission to hand out those handbills, and that would let the gap (sic) down, and might get them in trouble with the Government, that they

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[6] The text of the notice read:

APRIL 1, 1943.

To all foremen, employees, and bulletin boards:

This company desires to inform each of its employees of a definite fixed policy which it does and will adhere to.

Any statement or rumors by any persons, contrary to the policy stated herein are without authority and are hereby repudiated.

The employees of this company have the right to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and this company will not interfere with, restrain, or coerce any employees in his or her exercise of these rights.

The company will not undertake or permit any interference, aid, or restraint of its employees in the exercise of their right of self-organization and concerted activities for the purpose of collective bargaining or other mutual aid and protection mentioned above.

This company does not, neither will it, discriminate in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization.

This company seeks at all times to be ready and willing to cooperate with our employees, or their representatives, for the mutual benefit of our company, our employees, and our country.

LETOURNEAU CO. OF GEORGIA,
JACK SALVADOR,
Vice Pres.-General Manager.

The respondent's rule prohibiting the distribution of literature without permission is discussed below.

were not supposed to have anything to do for the Union or against it, and * * * for that reason he could not give [Ayers] permission". Ayers then inquired how far the respondent's property extended. Salvador replied that he knew "it was inside of the fence", but did not know "how far out toward the highway it went", and suggested that Ayers speak to Stokes regarding the matter.

During lunch hour the following day, Ayers went to the south lot where his truck was parked, distributed union handbills to 8 or 10 employees, and ate his lunch in the rear of the lot. Having finished his lunch, Ayers returned to his truck, which contained a number of the handbills, secured some, and placed 20 to 25 in automobiles parked on the lot. Tom J. Born, one of the respondent's guards stationed in the vicinity of the south lot, noticed Ayers' activities. When Ayers returned to his
39 truck a second time in order to obtain more handbills, Born, who had been relieved by another guard, approached him. Born directed Ayers to go with him to the guard office. Upon their arrival at the office, Born told Lieutenant Brown of the guard that Ayers "was putting out some circulars there * * *" Brown asked Ayers if he was aware that he had been violating the respondent's rules, and Ayers replied that he had not been on company property. By this time Stokes appeared and was apprised by Brown of Ayers' conduct, and Born left. Ayers told Stokes where he had distributed literature, and was informed that he had been on the respondent's property. Accompanied by Ayers, Stokes walked to the south lot and noticed handbills littered on the lot and present in the interior of several parked automobiles. They returned to the office and later conversed with Plant Manager Salvador. Stokes told Salvador what Ayers "had been doing", and Salvador directed Stokes and Ayers to speak to Vice-President and General Manager Jack Salvador. Upon ascertaining that Vice-President Salvador was not to be found, Stokes permitted Ayers to return to work with the understanding that Ayers would be notified when Salvador was available. Ayers worked in his department until 4 o'clock that day. At that time General Foreman Orvill Dubie called Ayers' attention to a "card" which detailed Ayers' activities in the south lot, and contained the information that Ayers was suspended for 2 days. Although Dubie asked Ayers to sign the "card", Ayers refused, insisting that he first be allowed to speak to Vice-President Salvador. After work that evening, Ayers spoke to Vice-President Salvador. With respect to this conversation, Ayers testified as follows: "I went in to talk with him after work hours that evening, and he said that there had been two other fellows

laid off for the same purpose, and he was sorry it was me, but he would have to just lay me off too". Ayers was suspended from work for July 17 and 19.[4]

40 Ferguson and Ayers have continued in the respondent's employ. Although Ayers has distributed union literature to the respondent's employees since his suspension, he has been compelled, in doing so, to stand on U. S. Highway 13, or its shoulders, between the north and south lots. Consequently, he has not been able, in this manner, to distribute literature to all the respondent's employees who enter and leave the plant premises.

From the evidence, it is apparent that Ferguson and Ayers were suspended for the asserted reason that they violated the respondent's rule against the distribution of literature.

2. The Rule Against the Distribution of Literature

The earliest record of the respondent's attitude concerning the distribution of literature appears in a list of instructions given the supervisory force about October 11, 1940. "The posting of handbills, placards, posters, or advertising matter about the plant without the permission of the Plant Manager or Industrial Relations Manager" was mentioned in these instructions as cause for discharge after a previous warning. While there is no direct evidence that the employees received notice of the instructions, the record reveals that supervisors were charged with the obligation to make the respondent's rules known to their subordinates.

Prior to July 3, 1941, merchants would enter the north lot, distribute their advertising matter to the respondent's employees, and place such literature in parked automobiles. Coincident with this practice, the parking lot became littered, thefts of property from within parked automobiles occurred, automobile accessories were found missing, and one automobile was stolen from the lot.

Complaints were made to the management by employees
41 who were the victims of such acts. As a result of the littering and thefts, and after conferences among the respondent's officials, on July 3, 1941, Captain Stokes of the guard sent an order to the plant protection force whose subject was, "Distributing literature on Co. Property", and which read, in part: "In the future no Merchants, Concern, Company or Indidivdual or Individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on Company property without first securing permission from the Personnel Department."

[4] Sunday intervened.

At about the same time Stokes' order was issued, the respondent's personnel manager sent a notice directed to all foremen, supervisors, and bulletin boards, which embodied in substance the proscription contained in the order. There is no specific evidence that the notice was posted; however, it is the respondent's practice to post on its bulletin boards all material directed to be placed there.

In October, 1941, a printed pamphlet entitled "You and your company," containing rules and regulations governing the conduct of employees was given to all in the respondent's employ. This pamphlet has been and still is issued to all new employees. As cause for immediate discharge the pamphlet lists, "The Posting of handbills, placards, posters, or advertising matter on Company property without the permission of the Personnel Manager."

The plant protection force, in the latter half of 1941, received a list of "General Rules and Regulations" to be enforced. Under a section headed, "Posters and Circulars," the following appeared: "Every member of the Plant Police will prevent when possible and report at once the posting or distributing of any notices, papers, or literature on Plant property without the permission of the Management. * * *"

42 From July 3, 1941, the prohibition of the distribution of literature on the respondent's plant premises, inclusive of the north and south lots, has been strictly enforced. Persons, including Clifton W. Brannon, the respondent's "legal advisor," have been refused permission to distribute religious literature on any company property. Trades people from Toccoa, Georgia, have been denied the privilege of distributing their advertising matter on the respondent's premises. Those individuals who proceeded to distribute reading matter without permission were immediately stopped when they were observed, and their attention called to the respondent's rule.

A set of rules was conspicuously posted in the plant at the beginning of April, 1943, headed, "Violation Of The Following Rules Will Be Cause For Immediate Discharge." One of the prohibitions was, "The posting of handbills, placards, posters or advertising matter about the plant without permission of the Plant Manager."

Between April 8, 1943, and May 15, 1943, the respondent placed on its bulletin boards another set of rules, headed, "Violation of the Following Rules Will Be Cause for Immediate Discharge." As a reason for dismissal, these rules listed, "Posting or distributing handbills, placards, posters, or advertising matter of

any nature about the plant without permission of the Plant Manager."[9]

Ferguson's suspension occurred while the April, 1943, rules were posted, and Ayers was penalized during the time the latest set of rules appeared on the respondent's bulletin boards.

43 CONCLUSIONS

The written notice directed to employees which was current at the time of Ferguson's suspension and which was posted in the beginning of April 1943, prohibited the "posting" of literature "about the plant" without permission. From such verbiage it is not clear that on April 8, 1943, the day Ferguson distributed literature in the north lot, the respondent's employees were cognizant that permission was needed to distribute literature in the respondent's north and south lots.

Nor is it clear that on July 16, 1943, the day Ayers distributed literature in the south lot, the respondent's employees were aware of the proscription, without previous permission, of the distribution of literature in these lots. Between April 8, 1943, and May 15, 1943, the respondent posted a written notice for the attention of its employees in which it forbade "distributing" as well as "posting" literature "about the plant"; "about the plant" may or may not connote the parking lots. It is significant, however, that Ayers questioned Plant Manager Salvador on July 15, 1943, regarding the extent of the respondent's premises, thus revealing some knowledge that the rule covered property beyond the fence.

That the respondent at all times since 1941 did in fact prohibit the distribution of literature within its plant and north and south lots is, however, certain. Because of the littering of its north lot and the thefts which there occurred, the respondent's plant protection force received orders on July 3, 1941, to prevent the distribution of literature on "Company property" unless permission was first granted by the "Personnel Department". At about the same time, the respondent caused a notice to be sent to its supervisory force and for its bulletin boards, embodying in substance the July 3 order. In the latter half of 1941 the plant pro-

44 tection force was again enjoined to prevent the "distributing" of literature on "Plant property" without the management's previous permission. License to distribute literature in the north and south lots has not been granted anyone. From July, 1941, to the present, the respondent assiduously prohibited

[9] From 1941 until the present, the respondent has published a magazine entitled "Now." This publication is intended for the respondent's employees. It has been the respondent's practice to place the magazine in several wooden boxes located within the plant and to permit employees to take copies for reading purposes.

the distribution of literature on its plant premises and north and south lots. Tradesmen and others were denied the privilege; Brannon, the respondent's "legal advisor", has been refused permission. Those who attempted to distribute literature in the respondent's north and south lots without first securing permission were immediately halted after they were observed. While the evidence discloses that those who were refused the right to distribute literature in the respondent's plant and lots were not in the respondent's employ, there is no evidence that employees were allowed to distribute literature there.

Under other circumstances, changing, during union activity, a notice directed to employees within approximately one month's time by adding a prohibiting against "distributing" would render the respondent's motive suspect. But, in these circumstances, considering the promulgation of a policy proscribing the distribution of literature within the respondent's plant and north and south lots and its consistent enforcement long before the advent of union activity, the only significance which can be attached to the change is the respondent's apparent desire more accurately to apprise its employees of its actual rule. It is clear, moreover, by virtue of the foregoing facts, that the respondent's proscription of the distribution of literature of all types in its plant premises and north and south lots was initiated, and enforced in the cases of Ferguson and Ayers, without discrimination.[10]

45 It is contended by counsel for the Board that the rule is inherently violative of the Act insofar as it applies to the distribution of union literature beyond the fence enclosing the plant premises. There is no evidence that the respondent prohibited or intended to prohibit the distribution of union literature on any of its property other than its plant premises and north and south lots.[11] The issue is consequently clear. The question to be determined is whether the rule is repugnant to the Act as it applies and has been applied to the distribution of union literature in the respondent's north and south lots. The north lot is owned by the respondent and the south lot is leased by it. Both are adjacent to the plant premises. The respondent maintains and cleans the lots at its expense. In order to avoid the littering of these lots and thefts of its employees' property the respondent promulgated and enforced the rule. In the recent *Tabin-Picker & Co.* case[12] the Board held that, "In the interest of keeping the plant clean and orderly it is not unreasonable for an employer to prohibit the dis-

[10] The practice of placing the magazine "Now" in wooden boxes located in the plant is not such a departure from the rule's enforcement as to indicate discrimination.

[11] As found above, the respondent and its subsidiary corporation own about 6,000 acres of land in and about the respondent's plant. The respondent, in addition, also owns approximately 50 homes in the plant's vicinity.

[12] Matter of Tabin-Picker & Co., 50 N. L. R. B., No. 133.

tribution of literature on plant premises at all times." Since the respondent has undertaken to provide parking facilities for its employees and to maintain and clean them at its expense, there is no persuasive reason to apply in respect to the parking lots in the instant proceeding a principle different from that which was enunciated in the *Tabin-Picker & Co.* case with regard to "plant premises". Counsel for the Board argues that the rule is unreasonable because those wishing to distribute literature, as in the case of Ayers, will be forced to stand on U. S. Highway 13, or its shoulders, and will be unable to reach all the respondent's employees. Yet, other ways of disseminating union literature are not foreclosed and other means of organizing are not barred by the rule.

46 Accordingly, it is found that the rule, as it applies and has been applied to the plant and north and south lots, is reasonable and valid, has not been interpreted and enforced in violation of Section 8 (1) of the Act, and that the suspensions of Ferguson and Ayers were not discriminatory within the meaning of Section 8 (3) of the Act. It will be recommended below that the complaint be dismissed in its entirety.[12]

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. The operations of the respondent occur in commerce, within the meaning of Section 2 (6) of the Act.

3. By suspending Grady Ferguson and L. Wayman Ayers the respondent has not engaged in unfair labor practices, within the meaning of Section 8 (3) of the Act, nor has the respondent engaged in any unfair labor practices, within the meaning of Section 8 (1) of the Act.

47

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that the complaint herein be dismissed in its entirety.

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[12] The issue of the allegedly unlawful conduct of Foreman Arlo Todd, although not alleged in the complaint, arose at the hearing. On April 8, 1943, the day of the election, as Ayers and employee George Taylor were about to enter the polls, Taylor stated, "We're going in there and mark the biggest yes we can." Todd remarked, "You better use your head." According to Ayers, since July 1943, Todd on occasion has jocularly called him "Mr. President," in one instance has asked him to pay Todd dues, and generally "makes fun" of him. Under all the circumstances, the undersigned finds that Todd's conduct does not constitute interference with, restraint, or coercion of the respondent's employees in the exercise of the rights guaranteed under the Act.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 19, 1943,—any party or counsel for the Board may within fifteen (15) days from the date of the entry of the Order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record of proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the Order transferring the case to the Board.

Dated: November 17, 1943.

WILLIAM FELDESMAN,
William Feldesman,
Trial Examiner.

48

Before the National Labor Relations Board

Case No. 10–C–1342

In the Matter of LETOURNEAU COMPANY OF GEORGIA *and* UNITED STEELWORKERS OF AMERICA, CIO

Order transferring case to the National Labor Relations Board

A hearing in the above-entitled case having been held before a duly designated Trial Examiner and the Intermediate Report of the said Trial Examiner, a copy of which is annexed hereto, having been filed with the Board in Washington,

It is hereby Ordered, pursuant to Article II, Section 32, of National Labor Relations Board Rules and Regulations—Series 2, as amended, that Case No. 10–C–1342 be, and it hereby is, transferred to and continued before the Board.

Dated, Washington, D. C., November 15, 1943.

By direction of the Board:

JOHN E. LAWYER,
John E. Lawyer,
Chief, Order Section.

49 *Exhibit*

United Steelworkers of America,
718 Jackson Place NW.,
Washington, D. C., *November 29, 1943.*

National Labor Relations Board,
Washington, D. C.

Re: Letourneau Company of Georgia
Case No. 10-C-1342

Gentlemen:

Attached are four copies of exceptions to the Trial Examiner's report and brief in support of exceptions in the above matter. The undersigned respectfully requests the opportunity to argue orally before the Board in this matter.

Sincerely yours,

(S) Eugene Cotton,
Eugene Cotton,
Assistant Counsel.

Attachments 8.
(Copy.)

Before the National Labor Relations Board
Case No. 10-C-1342

In the Matter of LeTourneau Company of Georgia *and* United Steelworkers of America, CIO.

Exceptions to Trial Examiner's Intermediate Report

Received Nov. 30, 1943, 9:12 A. M., National Labor Relations Board.

The United Steelworkers of America hereby excepts to those portions of the Intermediate Report of the Trial Ex-
50 aminer which finds and concludes that the suspension of Ferguson and Ayers were not discriminatory within the meaning of Section 8 (3) of the Act and do not constitute interference with employee rights within the meaning of Section 8 (1) of the Act and that the rule invoked by the company in connection with the said suspension was not inherently and in its application violative of the Act as applied to the distribution of union literature beyond the fence enclosing the plant premises and that the rule on its face

and as applied to the plant and north and south lots is reasonable and valid.

The United Steelworkers further except to the failure of the Trial Examiner to find and conclude that the suspension of Ferguson and Ayers constituted an unfair labor practice within the meaning of Section 8 (3) of the Act and that the rule invoked by the respondent is on its face inherently violative of the Act insofar as it applies to the distribution of literature in the north and south lots of the company, and that the said rule was in its inception and in its application an act of discrimination and interference with the rights guaranteed to employees under the Act.

Respectfully submitted,

UNITED STEELWORKERS OF AMERICA,
LEE PRESSMAN, *General Counsel.*
EUGENE COTTON, *Assistant Counsel.*

NOVEMBER 29, 1943.

51 Before the National Labor Relations Board
Tenth Region

Case No. 10-C-1342

In the Matter of LETOURNEAU COMPANY OF GEORGIA *and* UNITED STEELWORKERS OF AMERICA, CIO

Exceptions

Now comes Paul S. Kuelthau, Regional Attorney, Tenth Region, National Labor Relations Board; and takes the following exceptions to the Intermediate Report of the Trial Examiner in the above-entitled matter, dated November 11, 1943:

1. Excepts to the findings of the Trial Examiner on page 5, line 58; page 6, line 4; page 7, line 28; and page 8, line 12; that respondent promulgated the rule in question in order to prevent littering of the parking lots on the respondent's property because such finding is contrary to the evidence.

2. Excepts to the findings of the Trial Examiner on page 8, lines 4, 5 and 6, that there is no evidence that the respondent prohibited or intended to prohibit the distribution of union literature on any of its property, other than its plant premises in the north and south lots, because said finding is contrary to the evidence and completely unsupported by any evidence.

52 3. Excepts to the finding of the Trial Examiner on page 8, lines 14 to 22, that the application of the rule to

the parking lots in the instant case is similar to the prohibition of distribution of literature in the Tabin-Picket Company case for the reason that that conclusion is contrary to the evidence and not supported by the evidence.

4. Excepts to the finding of the Trial Examiner on page 8, lines 26 and 27, that other ways of disseminating union literature are not foreclosed by the rule in question, because it is contrary to the evidence and not supported by any evidence.

5. Excepts to the finding of the Trial Examiner on page 8, lines 29 to 34, that the rule, as applied by the respondent is reasonable and valid and not a violation of the National Labor Relations Act, and that the suspension of Ferguson and Ayers were not violations of the National Labor Relations Act, because said findings are contrary to the evidence and not supported by the evidence.

Respectfully submitted.

PAUL S. KUELTHAU,
Paul S. Kuelthau,
Regional Attorney,
National Labor Relations Board, Tenth Region.

Dated at Atlanta, Georgia, this 29th day of November 1943.

53

National Labor Relations Board
Washington, D. C.

Case No. 10-C-1363.

In the Matter of SEWELL HATS, INC., *and* CLIFFORD R. WHEELESS, AN INDIVIDUAL, AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

Notice of hearing

Noted Dec. 6, 1943, 11 A. M., Administrative Statistics, N. L. R. B.

Please Take Notice that pursuant to authority vested in the National Labor Relations Board under an Act of Congress (49 Stat. 449), a hearing will be held before the National Labor Relations Board on Thursday, December 16, 1943, at 10:30 A. M., or as soon thereafter as the Board may hear you, in the Hearing Room at 815 Connecticut Avenue Northwest, Washington, D. C. for the purpose of oral argument in the above-entitled matter. Argument will be limited to one-half hour for each party, and you are hereby advised that in view of the Board's docket no request for additional time made at the hearing will be granted.

You may appear and be heard if you so desire.

Should the party requesting oral argument decide not to appear, such party must immediately notify the Board and all other parties. This is necessary in order to avoid serious inconvenience and expense to other parties.

Dated, Washington, D. C., December 3, 1943.

[SEAL] JOHN E. LAWYER,
John E. Lawyer,
Chief, Order Section.

54 Before National Labor Relations Board

Date: December 16, 1943. Time Began: 11:15 A. M. Time Ended: 12:25 P. M.

Board Members Present: (1) Dr. Millis, (2) Mr. Houston, (3) ------ ------

Oral Argument

Case No. 10-C-1342.

Name: LeTourneau Company of America.

Appearances—(A) Of Counsel to the Board: Review Attorney.

(B) For the Company—Name: A. C. Wheeler, Esq. Address: Box 679, Gainesville, Georgia.

Name: C. W. Brannon, Esq. Address: Toccoa, Georgia.

(C) For the Union—Name: Eugene Cotton, Esq. Address: 718 Jackson Place NW., Washington, D. C.

Name: ------ ------. Address: ----------

(D) For the Intervener—Name: ------ ------. Address: ----------

55 Before the National Labor Relations Board

Case No. 10-C-1342

In the Matter of LETOURNEAU COMPANY OF GEORGIA *and* UNITED STEELWORKERS OF AMERICA, CIO

Mr. Paul S. Kuelthau, for the Board.

Wheeler, Robinson and Thurmond, by Mr. Alonzo C. Wheeler, and Mr. Emory F. Robinson, of Gainesville, Ga.; and Mr. Clifton W. Brannon, and Mr. C. M. McClure, of Toccoa, Ga., for the respondent.

Mr. Archie W. Graham, of Atlanta, Ga., and Mr. Eugene Cotton, of Washington, D. C., for the Union.

Mr. Robert E. Tillman, of Counsel to the Board.

Decision and order

D

STATEMENT OF THE CASE

Upon a first amended charge duly filed on October 13, 1943, by United Steelworkers of America, CIO, herein called the Union, the National Labor Relations Board, herein called the Board, by its Acting Regional Director for the Tenth Region (Atlanta, Georgia), issued its complaint dated October 15, 1943, against LeTourneau Company of Georgia, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce, within the meaning of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint and notice of hearing thereon were duly served upon the respondent and the Union.

36 With respect to the unfair labor practices, the complaint, as amended at the hearing, alleged in substance that the respondent: (1) on or about April 8, 1943, suspended Grady Ferguson for 2 days, and on or about July 16, 1943, suspended L. Wayman Ayers for a similar period, for the reasons that Ferguson and Ayers had distributed Union literature outside the plant premises, joined and assisted the Union and engaged in concerted activities; (2) on or about August 11, 1943, by Foreman LaBranch of the machine shop, prohibited Union literature from being brought into its plant by employees of the machine shop, although it permitted other literature to be brought into its plant;[1] (3) interpreted and enforced outside the plant fence, a rule against distribution of literature;[2] and (4) by suspending Ferguson and Ayers violated Section 8 (3) of the Act, and by said suspensions and all the foregoing conduct interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. On October 26, 1943, the respondent filed its answer admitting that it had suspended Ferguson and Ayers, but denying that it had engaged in the alleged unfair labor practices.

Pursuant to notice, a hearing was held on October 28, 1943, at Toccoa, Georgia, before William Feldesman, the Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel, the Union by its Field Representative, and all participated in the hearing. Full opportunity to be heard, to examine and cross examine witnesses, and to

[1] On motion of the respondent made at the hearing, this allegation was stricken from the complaint, without objection, for failure of proof.

[2] On motion of the Board made at the hearing, the complaint was amended by adding this allegation.

introduce evidence bearing upon the issues was afforded all parties.

57 The respondent moved at the hearing to dismiss the complaint. Ruling on this motion was reserved, and the motion was subsequently granted by the Trial Examiner in his Intermediate Report. For reasons set forth below, we think the motion to dismiss should have been denied, and we hereby reverse this ruling of the Trial Examiner. The other rulings of the Trial Examiner on motions and on objections to the admission of evidence are free from prejudicial error and are hereby affirmed.

The Trial Examiner thereafter filed his Intermediate Report dated November 11, 1943, copies of which were duly served upon the parties. He found that the respondent had not engaged in unfair labor practices affecting commerce and accordingly recommended that the complaint be dismissed. On November 30, 1943, the Union, and on December 1, 1943, the Board's attorney, filed exceptions to the Intermediate Report and a brief in support thereof. On December 17, 1943, the respondent filed a brief. The Union requested permission to present oral argument before the Board. On December 16, 1943, pursuant to notice served upon all the parties, a hearing for the purpose of oral argument was held before the Board at Washington, D. C. The respondent and the Union appeared and participated.

The Board has considered the briefs and exceptions and, to the extent that they are consistent with the findings set forth below, the exceptions filed by the attorney for the Board and by the Union are sustained.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. THE BUSINESS OF THE RESPONDENT

LeTourneau Company of Georgia, a Georgia corporation created in 1938, owns and operates a plant near Toccoa,
58 Georgia, where it is engaged in the manufacture and sale of earth moving machinery, specialty machines, shells, and other products essential to the war effort. During the year 1942 the respondent purchased $3,932,420.55 worth of raw materials, almost all of which were shipped to its plant from points outside the State of Georgia. During the same period the respondent sold finished products having a value of $6,746,525.10, of which more than 80 per cent was shipped from its plant to points outside the State of Georgia.

II. THE ORGANIZATION INVOLVED

United Steelworkers of America is a labor organization affiliated with the Congress of Industrial Organizations, admitting to membership employees of the respondent.

III. THE UNFAIR LABOR PRACTICES

A. *The suspension of Grady Ferguson and L. Wayman Ayers*

1. The Geographical Lay-out of the Plant Premises

The respondent's plant is located 3 miles northeast of Toccoa, Georgia. Approximately 6,000 acres of the surrounding land are owned by the respondent or its subsidiary corporation, the Louise Farming Company. The respondent's properties include the adjacent town of Turnapull which is located along the south side of U. S. Highway No. 13, and consists of a store and some 50 houses occupied by a number of the employees of the correspondent. The majority of the respondent's employees live in scattered communities or on farms within a 20-mile radius of the plant. The plant itself extends along the north side of U. S. Highway No. 13 and is divided into two sections by a roadway which intersects the highway. One section comprises the
59 office buildings, cafeteria, and the main plant, while the other consists of the steel foundry storage yard, machinist school, and warehouse. Enclosing each of the two sections is a 6-foot fence. Along the front of the plant, this fence roughly parallels the highway for a total distance of approximately 1,000 feet, and is set back from the highway at distances which vary from 30 to 400 feet. The land between the fence and the highway is owned by the respondent.[2] The main entrance to the plant is a gate adjoining the office building which serves as a section of the fence. Virtually all the respondent's employees enter and leave the plant through this gate,[3] including those employed in the foundry section, who traverse the yard of the main plant to pass through a side gate opening on the intersecting road and standing opposite a gate leading into the foundry section. The main gate and the office are set back 100 feet from the highway, and the intervening space is paved with solid concrete extending along the highway for a distance of 150 feet. This concrete area and a connected gravel plot, hereinafter jointly referred to as the North lot, provide parking space for approximately 60 percent of the respondent's 2,100 employees who travel to and from work in auto-

[3] The time clocks are located just inside this gate.

mobiles. A space is also reserved on this lot for busses which carry other employees to and from work. On the opposite side of the highway is an improved sand and gravel parking lot, hereinafter referred to as the South lot, which is utilized for parking by approximately 30 percent of the employees. The site of this latter lot is leased by the respondent from its subsidiary. Both lots are maintained, kept clean, and guarded by the respondent's plant-protection force.

2. The Rule Against the Distribution of Literature on Plant Premises

There seems to be no question but that in April and July, 1941, when the alleged unfair labor practices occurred, the
60 respondent had in force a rule against the distribution of literature, although from July 1941 to May 1943, the rule appeared in many different forms, some limited only to proscribing posting. The earliest record of the rule is disclosed in a list of instructions given to the respondent's supervisory force on or about October 11, 1940. Therein it was noted that "the posting of handbills, placards, posters, or advertising matter about the plant without permission of the Plant Manager or Industrial Relations Manager" was cause for immediate discharge. This early rule was obviously directed only at employees. At about the time these instructions issued, and continuing to July 3, 1941, merchants from nearby towns were in the habit of employing boys to distribute their advertisements among the respondent's employees. These boys and other distributors of pamphlets and reading matter would enter the North lot and place their literature in the parked automobiles. This practice resulted in the littering of the lot and a series of thefts from the automobiles. After conferences among plant officials concerning the littering and thefts, on July 3, 1941, Captain Stokes of the guard force issued an order to his men, which read in part as follows: "In the future no Merchant, Concern, Company or Individual or Individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on Company property without first securing permission from the Personnel Department." A similar order was issued to the supervisory force and directed to be placed on the bulletin boards.

Since October, 1941, the respondent has provided its employees with a printed pamphlet containing information concerning the plant. Included therein is a list of rules, the infraction of which is stated to be cause for immediate discharge. Rule 22 prohibits

"The posting of handbills, placards, posters, or advertising matter on Company property without permission of the Personnel
61 Manager." About this same time, the plant protection force was issued a set of rules to enforce, which included an instruction "to prevent when possible and report at once the posting or distributing of any notices, papers, or literature on Plant property without the permission of the Management. * * *"

At the beginning of April 1943, the bulletin boards displayed a rule which forbade "posting" only, although, as has been indicated above, in the latter half of 1941 an order was directed to be placed on the bulletin boards prohibiting distributing, posting, or otherwise circulating literature. Sometime between April 8, 1943, and May 15, 1943, the respondent placed another set of rules on the bulletin boards, this time prohibiting "posting or distributing * * * without permission of the Plant Manager." This was subsequent to the lay-off of Ferguson, but prior to the lay-off of Ayers.

In spite of the apparent lack of uniformity in the printed version of the respondent's rule against distributing literature on plant premises, it is uncontradicted in the record that, since July 3, 1941, the plant protection force has strictly enforced a no-distributing-no-posting rule on the respondent's premises, including the two parking lots. There is no evidence that either outsiders or employees have been permitted to distribute literature of any kind on the lots since that time.

3. Sequence of Events

In February 1943, the Congress of Industrial Organizations, herein called the C. I. O., commenced to organize the respondent's employees. An election was held on April 8, 1943, which resulted in the defeat of the C. I. O. Thereafter, the Union sought to organize the respondent's employees.

62 On the date of the election, Grady Ferguson, an employee of the respondent for over 2 years, having finished his day's work, boarded a bus standing in the North lot. He saw some C. I. O. handbills in the bus, which he proceeded to pass out to other persons in the bus who requested them, and then handed four or five through an open window of the bus to persons standing on the lot. At this point, Captain Stokes observed his actions and requested Ferguson to accompany him to guard headquarters. There Ferguson was instructed to see the Plant Manager the next day. Ferguson spoke to the Plant Manager as instructed and was advised that he would be laid off just as others had been laid off for distributing literature without permission, and that the

respondent was not motivated, in taking such action in his case, but the nature of the literature being distributed. Ferguson was then suspended from work for April 9 and 10, 1943.

L. Wayman Ayers, an employee of the respondent for 4 years, had been interested in the C. I. O. After the C. I. O. lost the election, he joined the Union and on or about July 9, 1943, became president of the local. On July 15, Ayers sought permission from the Plant Manager to distribute, and post about the plant, handbills announcing a Union meeting for July 17. His request was refused, the Plant Manager stating, in effect, that to grant permission would be letting the bars down, and that the respondent might get into trouble under the Act for aiding the Union. Ayers then inquired how far the respondent's property extended. The Plant Manager replied that he knew it was inside of the fence, but he did not know "how far out toward the highway it went," and suggested that Ayers consult with Captain Stokes. Ayers did not consult Captain Stokes, but, on the following day during his lunch period, entered the South Lot where he had parked his truck, gathered some Union handbills from the truck and distributed
63 them to 8 or 10 employees. He then ate his lunch, gathered up some more handbills and proceeded to place them in automobiles parked in the lot. A guard noticed his activities, and on Ayers' return to the truck for another handful, the guard approached him and directed him to guard headquarters. At headquarters Ayers was asked whether he knew that he had been violating a rule. Ayers insists that he had not been on the respondent's property. Captain Stokes then informed Ayers that the South lot was the respondent's property. After consulting with the Plant Manager, Ayers and Stokes were directed to speak to the General Manager, but were unable to contact him. Ayers returned to work. After work, he spoke to the General Manager and was informed that two other employees had been laid off for the same violation, and that he would also have to be laid off. Ayers was suspended from work on Saturday, July 17, and Monday, July 19, 1943.

Both Ferguson and Ayers have continued in the respondent's employ since their respective suspensions.

4. Conclusions

The record in the instant proceeding is free from dispute as to the material facts. There is disagreement, however, as to what inferences may properly be drawn from the facts. The Board's attorney contends that they show a discriminatory application of the rule against distribution to Ferguson and Ayers, because of their union activities; the respondent denies any such discrimina-

tion. At the oral argument before the Board, counsel for the Union conceded that there was no basis in the record for a finding of a discriminatory application of the rule by the respondent. We have carefully considered the facts, as they have been set forth herein, and, while we note the apparent confusion evident in the many and varied forms in which the rule
64 against distribution of literature has been published, we are of the opinion and find, as did the Trial Examiner, that the record does not support a charge that the rule was discriminatorily enforced against Ferguson and Ayers. It is undisputed that the rule against distribution has been applied to all persons, without exception, seeking to distribute literature on the parking lots where Ferguson and Ayers were apprehended. There remains for consideration, however, the broader issue whether a rule prohibiting the distribution of union literature by employees in areas outside the plant proper, although on company property, is in itself repugnant to the Act under the circumstances of this case. The Trial Examiner considered this broader issue and, upon finding that the rule had as one of its purposes the prevention of littering, concluded that the instant case was governed by the Board's decision in Matter of Tabin-Picker & Co.,[4] in which the Board stated that, "In the interest of keeping the plant clean and orderly it is not unreasonable for an employer to prohibit the distribution of literature on plant premises at all times." We do not agree, for reasons set forth hereinafter, that the instant case is controlled by the broad principle stated in the Tabin-Picker case.

The instant case is one which requires an evaluation of conflicting rights and policies—the employer's right to regulate the use of his own property, on the one hand, as against the employee's right to receive information to enable them to exercise their right to self-organization, which it is the policy of the Act to encourage. It is well settled in our law that certain rights are not absolute, but qualified, and that where conflicts between rights arise, a determination must be made as to which should give way, and which should be deemed paramount, in order to achieve the greater good. As the Circuit Court of Appeals for the Second Circuit has held, "It is not every interference
65 with property rights that is within the Fifth Amendment and * * * Inconvenience or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining".[5] The Board has frequently applied this principle in decisions involving varying sets of circumstances,

[4] 50 N. L. R. B. 928.
[5] N. L. R. B. v. Cities Service Oil Co., 122 F. (2d) 149, 152 (C. C. A. 2). See also N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1, 43, 44; Art Metal Construction Co. v. N. L. R. B., 110 F. (2d) 148, 150 (C. C. A. 2).

where it has held that the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining, and in those decisions which have reached the Courts, the Board's position has been sustained.[6] Similarly, the Board has held that, while it was "within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours," it was "not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property," the latter restriction being deemed an unreasonable impediment to the exercise of the right to self-organization.[7]

In view of the foregoing well established principles, the sole question confronting us is whether, under the circumstances
66 of the instant case, to the extent that the rule prohibits distribution of union literature by employees on the parking lots, it constitutes such a serious impediment to the freedom of communication which is essential to the exercise of the right to self-organization, that the right to self-organization must be held paramount, and the rule give way. It is clear that employees cannot realize the benefits of the rights to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization. It must also be noted that speech is not the only mode of communication by which self-organization is effected, nor is it sufficient that this channel alone be free. Effective organization requires the use of printed literature and of application and membership cards, and these modes of communication are also protected by the Act.

To what extent then does the respondent's rule impede the effective exercise of the right to self-organization?

As previously indicated, the respondent's plant is located in the country in the heart of 6,000 acres of land owned by it or its

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[6] Matter of West Kentucky Coal Co., 10 N. L. R. B. 88, 133, enforced as modified in N. L. R. B. v. West Kentucky Coal Co., 116 F. (2d) 816 (C. C. A. 6); Matter of Cities Service Oil Co., 25 N. L. R. B. 36, 57, enforced in part in N. L. R. B. v. Cities Service Oil Co., 122 F. (2d) 149, 152 (C. C. A. 2); Matter of Weyerhaeuser Timber Company, Longview Branch, 31 N. L. R. B. 258; Matter of American Cyanamid Co., 37 N. L. R. B. 578; Matter of Ozan Lumber Company, 42 N. L. R. B. 1073; cf. Matter of Harlan Fuel Company, 8 N. L. R. B. 25.

[7] Matter of Peyton Packing Company, 49 N. L. R. B. 828; Matter of Carter Carburetor Corporation, 48 N. L. R. B. 354; Matter of Scullin Steel Company, 49 N. L. R. B. 405; Matter of Republic Aviation Corporation, 51 N. L. R. B., No. 186; Matter of Denver Tent and Awning Corp., 47 N. L. R. B., No. 76, enforced in N. L. R. B. v. Denver Tent and Awning Corp., 138 F. (2d) 410 (C. C. A. 10).

subsidiary. Apart from U. S. Highway No. 13 (and perhaps the intersecting road), the respondent and its subsidiary own all the land adjacent to the plant. This, in itself, seriously limits the possibilities of effectively communicating with the bulk of the respondent's employees. This limitation would not, however, be too restrictive if the respondent's gate opened directly onto the highway, for then persons could stand outside the respondent's premises and distribute literature as each employee entered or left the plant. But at the respondent's plant the gate is
67 100 feet back from the highway, on company property. Over 60 percent of the respondent's employees, after passing the gate, enter automobiles or busses parked in the space between the gate and the highway, and presumably speed homeward, without ever setting foot on the highway. Distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is consequently seriously impeded. It is no answer to suggest that other means of disseminating union literature are not foreclosed. Moreover, the employees' homes are scattered over a wide area. In the absence of a list of names and addresses, it appears that direct contact with the majority of the respondent's employees away from the plant would be extremely difficult.

The respondent nevertheless urges the reasonableness of the rule on several grounds, one of which is to prevent littering of the plant premises. Although we recognized this justification for the rule in the *Tabin-Picker* case, as we have noted, we do not think that the general principle there stated is applicable to the peculiar facts of this case. There was no serious impediment to self-organization by the rule prohibiting distribution of literature in the plant proper in that case, since the employees could effectively distribute literature at the plant gates. Moreover, considerations of efficiency and order, which may be deemed of first importance within buildings where production is being carried on, do not have the same force in the case of parking lots. It is also to be noted that the respondent had no general rules against littering.

The respondent also urges that the rule is necessary and reasonable to prevent sabotage and thefts of automobiles and of property left therein. It appears that this problem was solved when
68 merchants were denied access to the lots to distribute advertisements. Since the employees have free access to the lots in any event, we fail to see how the fact that they use such access as an occasion to distribute literature has any bearing on

[1] Cf. Matter of Adolph Spalek and William J. Zvenchik, Co-Partners, doing business as Spalek Engineering Company, 45 N. L. R. B. 1272.

the problem of thefts. Finally, the respondent urges that the rule prevents literature from going into the plant where it might lessen efficiency and endanger the safety of machines and employees. We are not impressed with the sincerity of this contention. The respondent's own magazine, intended for its employees, is placed in wooden boxes which are located near the plant gate, where copies may be picked up and taken into the plant. Moreover, the respondent appears to have no rule barring the carrying of literature or newspapers into the plant. Such a rule would provide a better safeguard against the impairment of efficiency and safety in the plant that a rule directed at distribution, and would not be subject to the same objections.

Upon all the above considerations, we are convinced, and find, that the respondent, in applying its "no-distributing" rule to the distribution of union literature by its employees on its parking lots has placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization, and that by suspending Grady Ferguson and L. Wayman Ayers for violations of the rule, the respondent has discriminated in regard to their hire and tenure of employment, thereby discouraging membership in the Union and interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

B. *Other interference, restraint, and coercion*

Although not set forth in the complaint, the issue of the allegedly unlawful conduct of Forenian Arlo Todd, was raised at the hearing. Ayers testified that on April 8, 1943,
69 as he and employee George Taylor were about to vote in the election mentioned heretofore, Taylor said, "We're going in there and mark the biggest yes we can," to which Todd remarked, "You better use your head." Ayers further testified that since July, 1943, Todd has teased and made fun of him for being president of the Union local. Todd was not, during any of this time, Ayer's supervisor.

On April 1, 1943, the respondent posted in conspicuous places throughout its plant, the following notice:

APRIL 1, 1943.

To all foremen, employees and bulletin boards:

This company desires to inform each of its employees of a definite fixed policy which it does and will adhere to.

Any statement or rumors by any persons contrary to the policy stated herein are without authority and are hereby repudiated.

The employees of this company have the right to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and this company will not interfere with, restrain, or coerce any employee in his or her exercise of these rights.

The company will not undertake or permit any interference, aid or restraint of its employees in the exercise of their right of self-organization and concerted activities for the purpose of collective bargaining or other mutual aid and protection mentioned above.

This company does not neither will it discriminate in
70 regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization.

This company seeks at all times to be ready and willing to co-operate with our employees, or their representatives, for the mutual benefit of our company, our employees, and our country.

LeTourneau Co. of Georgia,
Jack Salvador,
Vice Pres.-General Manager.

In view of the posting of the above notice, and in the absence of any evidence indicating that any other supervisory employees or officers of the respondent failed to observe the letter of the notice and attempted to interfere with the employee's rights to self-organization, we do not consider that Todd's remarks and conduct truly represented the respondent's actual policy toward the concerted activities of its employees, nor could be so construed by the employees to whom they were made. We are of the opinion, as was the Trial Examiner, that, under all the circumstances, the remarks and conduct of Foreman Todd, standing alone, did not interfere with, restrain, or coerce the employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the respondent set forth in Section III A, above, occurring in connection with the operations of the respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the
71 several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the respondent has engaged in certain unfair labor practices, within the meaning of the Act, we shall Order that it cease and desist therefrom, and take certain affirmative action which we find will effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, the Board makes the following:

Conclusions of Law

1. United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization, within the meaning of Section 2 (5) of the Act.

2. By applying its no-posting-no-distributing rule to the distribution of union literature by its employees on its parking lots, the respondent has engaged in unfair labor practices, within the meaning of Section 8 (1) of the Act.

3. By suspending Grady Ferguson and L. Wayman Ayers, the respondent has engaged in unfair labor practices, within the meaning of Section 8 (1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

5. The respondent, by the remarks of Foreman Todd, has not engaged in unfair labor practices, within the meaning of Section 8 (1) of the Act.

Order

Upon the basis of the above findings of fact and conclusions of law, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby Orders that the respondent, LeTourneau Company of Georgia, Toccoa, Georgia, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, CIO, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of employment;

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively

through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Rescind immediately the rule against distribution of literature insofar as it prohibits distribution of union literature by employees outside the gates of the plant and in the parking lots;

(b) Make whole Grady Ferguson and L. Wayman Ayers by payment to them of a sum of money equal to that which
73 they would have earned on the respective days they were suspended from work, namely April 9 and 10, 1943, in the case of Ferguson, and July 17 and 19, 1943, in the case of Ayers; less their respective net earnings during such period;*

(c) Post immediately in conspicuous places throughout its Toccoa, Georgia, plant, and maintain for a period of at least sixty (60) consecutive days, notices to its employees stating that the respondent will not engage in the conduct from which it is Ordered to cease and desist in paragraphs 1 (a) and (b) hereof; that it will take the affirmative action set forth in paragraphs 2 (a) and (b) hereof; and that the respondent's employees are free to become and remain members of United Steelworkers of America, CIO, and the respondent will not discriminate against any of its employees because of membership in or activity on behalf of that organization;

(d) Notify the Regional Director for the Tenth Region in writing within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 12th day of February 1944.

[SEAL]

HARRY A. MILLIS,
Chairman.

GERARD D. REILLY,
Member.

JOHN M. HOUSTON,
Member.

National Labor Relations Board.

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*By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for his unlawful discharge and the consequent necessity of his seeking employment elsewhere. See Matter of Crossett Lumber Company, 8 N. L. R. B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See Republic Steel Corporation v. N. L. R. B., 311 U. S. 7.

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Case No. 10-C-1342

Affidavit as to service

District of Columbia, ss:

I, George A. Key, being first duly sworn, on oath saith that I am one of the employees of the National Labor Relations Board, in the office of said Board in Washington, D. C.; that on the 12th day of February, 1944, I mailed postpaid, bearing Government frank, by registered mail, a copy of the Decision and Order [and Intermediate Report] to the following named persons, addressed to them at the following addresses:

United Steelworkers of America, 216 Mortgage Guarantee Bldg., Atlanta, Georgia, 69444.

Mr. Archie W. Graham, 75 Ivy Street Northeast, Atlanta, Georgia, 69445.

Mr. Eugene Cotton, 718 Jackson Place Northwest, Washington, D. C., 69446.

LeTourneau Company of Georgia, Toccoa, Georgia, 69447.

75 Messrs. Alonzo C. Wheeler and Emory F. Robinson, Box 679, Gainesville, Georgia, 69448.

Clifton W. Brannon and C. M. McClure, Toccoa, Georgia, 69449.

(S) George A. Key.

Subscribed and sworn to before me this 12th day of February, 1944.

[seal] Kathryn B. Harrell,
Notary Public, D. C.

My commission expires March 1, 1947.

76 In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10954

LeTourneau Company of Georgia, petitioner

vs.

National Labor Relations Board, respondent

Certificate of the National Labor Relations Board

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and

Regulations of the National Labor Relations Board—Series 3, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in the proceeding had before said Board entitled, "In the Matter of LeTourneau Company of Georgia and United Steelworkers of America, CIO," the same being Case No. 10-C-1342 before said Board, such transcript including the pleadings, testimony and evidence upon which the Order of the Board in said proceeding was entered, including also the findings and Order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony held before William Feldesman, Trial Examiner for the National Labor Relations Board, on October 28, 1943, together with all exhibits introduced in evidence.

(2) Copy of Order, issued by Trial Examiner Feldesman, for corrections of errata in transcript of testimony, dated November 9, 1943.

(3) Copy of Trial Examiner Feldesman's Intermediate Report, dated November 11, 1943.

77 (4) Copy of Order transferring case to the National Labor Relations Board, dated November 15, 1943.

(5) Copy of Union's letter, dated November 29, 1943, requesting oral argument before the Board.

(6) Copy of Union's exceptions to the Intermediate Report, dated November 29, 1943.

(7) Copy of Board's exceptions to the Intermediate Report, dated November 29, 1943.

(8) Copy of notice of hearing for purpose of oral argument, dated December 3, 1943.

(9) Copy of list of appearances at oral argument held before the Board on December 16, 1943.

(10) Copy of decisions; findings of fact, conclusions of law, and Order issued by the National Labor Relations Board, February 12, 1944, together with affidavit of service thereof.

In Testimony Whereof the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the City of Washington, District of Columbia, this 22d day of March 1944.

[SEAL]

JOHN E. LAWYER,
John E. Lawyer,
Chief, Order Section,
National Labor Relations Board.

78 APPENDIX TO BRIEF FOR PETITIONER

In United States Circuit Court of Appeals for the Fifth Circuit

1. Motion to strike paragraph 7 from the original complaint

Mr. WHEELER. May I ask if the Board will insist that they have any substantial proof of the allegations contained in paragraph 7 of the charge?

Mr. KUELTHAU. I am willing to strike out paragraph 7.

Trial Examiner FELDESMAN. Do you so move, Mr. Wheeler?

Mr. WHEELER. We do.

Trial Examiner FELDESMAN. You have no objection to the motion?

Mr. KUELTHAU. No.

Trial Examiner FELDESMAN. The motion is granted, and paragraph seven is stricken from the complaint. Vol. 2, TR. p. 165.

2. Extract from testimony of Jimmie Haynes

Q. Mr. Haynes, has the Company within your knowledge attempted to interfere with the distribution of Union literature out on the highway, or near the highway immediately in front
79 of the plant?—A. No, there has been no interference with that. That goes on, absolutely.

Q. Have you had it handed to you out there yourself?—A. I have been in the bus or in a car when it was handed out, yes, without any interference or restriction whatsoever at that point. Vol. 2, TR. p. 171.

3. Extract from testimony of George M. Stokes

Q. I will ask you whether or not this rule with reference to distributing literature has by you or any one working under you ever been applied to any area outside of the plant and the parking space?—A. Not that I know of, sir. I have never extended that past that area, in other words, we have——

Q. Are the streets and roads leading to the houses at Tourna pull open to anybody that wants to use them?—A. Yes, sir. Vol. 22, pages 236–237.

4. Heading of rules posted by LeTourneau Company

80 Violation of the following rules will be cause for immediate discharge.

On the early rules under the same heading Rule 24 was as follows:

"The posting of handbills, placards, posters, or advertising matter about the plant without permission of the plant manager."

Vol. III, Board's Exhibit 2.

On the latter rules under the same heading Rule 24 read:

"Posting or distributing handbills, placards, posters, or advertising matter of any nature about the plant without permission of the plant manager." Vol. III; Board's Exhibit 2, following Book of Printed Rules.

5. Special order of Captain of Guard

JULY 3, 1941.

Special (Unnumbered).

To: All Guards and Guides

Subject: Distributing literature on Company property.

1. In order that the maximum amounts of safety be given to the property of our employees while on the property of LeTourneau Company of Georgia, the below named rule will be effective this date.

81 2. In the future no merchant, concern, company or individual or individuals, will be permitted to distribute, post, or otherwise circulate handbills or posters, or any literature of any description on company property without first securing permission from the personnel department.

(Signed) GEORGE M. STOKES,
Capt. of the Guard.

Board's Exhibit No. 3, Vol. III Tr.

6. Order from Military Department

Headquarters District No. 4, Fourth Service Command, Office of the District Commander.

Guard Order No. 1

To the Auxiliary Military Police at R. G. LeTourneau Co.

1. On (date) the guard forces at this Plant were activated by the War Department as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the articles of war and may be court-martialed or otherwise punished for violations thereof.

82 3. Effective on this date 8/13/42 a commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as auxiliary military police.

4. The mission of this guard force is to provide protection for this plant in addition to its normal functions, the force, or any member thereof whether on or off duty, is available for military use in any emergency, whether it be the result of flood, conflagration or other disaster; internal disorders, hazardous to the plant, property or its production; or enemy action of any nature. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.

5. The Government of the United States regards the protection of this plant and its production as essential in the successful prosecution of the war. The auxiliary military police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind from any source. If force must be used to accomplish this result, it will be used only to the extent reasonably necessary.

83 6. No member of the auxiliary military police may resign without the written approval of the plant guard officer. Inattention to duty, failure to attend required drill, and conduct unbecoming to the service may be cause for dismissal and the denial of a certificate of meritorious conduct.

For the Commanding Officer:

L. L. DETROIT, CMP,
Plant Guard Officer.

Date: 9-25-43.

7. Extract from first photostatic copy "General Rules and Regulations" attached to Vol. III, Tr. Exhibit No. 5 directed to members of the Plant Police

Posters and Circulars

Every member of the Plant Police will prevent when possible and report at once the posting or distributing of any notices, papers, or literature on Plant property without the permission of the Management. A copy of such notices, papers, or literature must be secured and forwarded to the Captain by the Guard making the report.

8. Quotation from same document under heading "Obedience"

These rules will work no hardship upon an employee
84 who desires to do right. Be impartial and just. Do not allow your personal likes and dislikes to swerve you from the path of duty. Promptly report any violations and have your report as complete as possible and absolutely truthful. If you do not know, do not guess. Anything lacking in your report must be obtained by further investigation and a supplemental report prepared.

9. Extract from Volume III, Exhibit No. 6 photostatic copy headed "Confidential"

(c) *Parking.*—Access to the plant is gained by United States Highway 13, through two main approaches. There is a concrete apron adjacent to and parallel to the highway for parking busses, trucks, and passenger automobiles. The entire parking area is under observation by the plant police at all times. This area, although outside the fence, is set apart by virtue of its construction so as to form an effective enclosure which meets all requirements. Cars or trucks coming into the plant enclosure are inspected at the gates prior to admittance. These gates are controlled from the inside giving ample protection against any possible attempt to effect entrance by force.

85 APPENDIX TO BRIEF FOR RESPONDENT

In United States Circuit Court of Appeals for the Fifth Circuit

Before the National Labor Relations Board

Tenth Region

Case No. 10-C-1342

In the Matter of LeTOURNEAU COMPANY OF GEORGIA *and* UNITED STEELWORKERS OF AMERICA, CIO

STEPHENS COUNTY COURTHOUSE,
TOCCOA, GEORGIA.
Thursday, October 28, 1943.

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock A. M.

Before WILLIAM FELDESMAN, Trial Examiner.

Appearances: Paul S. Kuelthau, 300 Ten Forsyth Street Building, Atlanta, Georgia, appearing for the National Labor Relations Board. Clifton W. Brannon and C. M. McClure, Toccoa, Georgia, and Alonzo C. Wheeler, and Emory F. Robinson, Box 679, Gainesville, Georgia, appearing for LeTourneau Company of Georgia. Archie W. Graham, Field Representative, 75 Ivy Street, Northeast, Atlanta, Georgia, appearing for United Steelworkers of America, CIO.

Mr. KUELTHAU. Mr. Wheeler has a statement in regard to the business of the Company, which he will read into the record as a stipulation.

Mr. WHEELER. The volume of business transacted by the Respondent for the calendar year 1942, the sales amounted to $6,746,525.10; raw materials purchased amounted to $3,932,420.55; the number of employees was 2,165; more than 80 percent of the shipment of goods were in interstate commerce.

Mr. KUELTHAU. More than 80 percent of the finished product was shipped out of the State?

Mr. WHEELER. That is right.

Mr. KUELTHAU. Was more than 80 percent of your raw materials obtained from out of the State?

Mr. WHEELER. Practically 100 percent of them.

86 Trial Examiner FELDESMAN. Is it so stipulated?

Mr. KUELTHAU. Yes.

Trial Examiner FELDESMAN. The stipulation is accepted.

Mr. WHEELER. At this point, I don't know whether this would be the proper place to do it or not, but I have agreed with Counsel for the Board that we would stipulate for the record that notices, a copy of which is attached to Respondent's answer as Exhibit A, were posted in conspicuous places and on the bulletin board of the Respondent in this plant on or about April 8—April 1, 1943.

Mr. KUELTHAU. That is correct.

Trial Examiner FELDESMAN. The stipulation is accepted.

Mr. KUELTHAU. Mr. Wheeler has also stated that he will accept my statement that the United Steelworkers of America is a labor organization within the meaning of Section 25 of the Act, as if it were evidence.

Trial Examiner FELDESMAN. Well, Mr. Wheeler, is it stipulated that the United Steelworkers of America, affiliated with the Congress of Industrial Organizations, is a labor organization within the meaning the National Labor Relations Act?

Mr. WHEELER. As far as we are required to go on that, we will accept the statement of Counsel on the other side, or the gentleman representing that organization, as evidence of that fact, whatever statement they see proper to make on it, without any disposition on our part to contest the truth of it.

Trial Examiner FELDESMAN. Having accepted Mr. Kuelthan's statement, I assume that you will concede that the United Steelworkers of America is a labor organization within the meaning of the Act.

Mr. WHEELER. Yes; we will.

* * *

EARL A. RHODES (Board witness).

Direct examination by Mr. KUELTHAU:

* * *

Q. What is your occupation?—A. I am Industrial Relations Manager of LeTourneau Company of Georgia and the Production Manager.

87 Q. Where are you located, Mr. Rhodes?—A. Tournapull, Georgia.

Q. And where is Tournapull, Georgia?—A. About three miles east and a little north of Toccoa, Georgia.

Q. Is there a town of Tournapull, Georgia?—A. Yes.

Q. What is located in that town?—A. The plant of the LeTourneau Company of Georgia, and its properties, and our little town where we have built several houses that some of our people live in.

Q. How large a town is it; how many houses are there there; very many?—A. I don't think there has ever been a census taken of it, but there are probably fifty houses.

Q. And are there any other business establishments there?—A. Other than our organization?

Q. Other than the LeTourneau Company of Georgia?—A. None that I know of.

Q. There is a Post Office?—A. A United States Post Office.

Q. And is there also a gasoline station?—A. Yes; our property.

Q. It belongs to the LeTourneau Company of Georgia, does it?—A. That is right.

Q. Does the LeTourneau Company own all of the land in this town?—A. So far as I know, we do. I cannot say that absolutely.

* * *

Q. Now, do you know how much properties the LeTourneau Company owns around this plant there?—A. Something like 6,000 acres.

Q. Does that include the property owned by the Louise Farming Company?—A. Yes.

Q. That is a subsidiary of the LeTourneau Company?—A. Yes.

Q. There is a United States Highway, is there not, running from Toccoa to Tournapull?—A. Yes, sir.

Q. Do you know the number of it?—A. It is No. 19, I think.
Q. 13, isn't it?—A. 13. I guess you are right.

* * *

88 By Mr. KUELTHAU:

Q. Where do most of those employees that you have out there at Tournapull live?—A. Most of them live in Toccoa and surrounding cities.

Q. And within a radius of how far of Tournapull do they live; do you have any idea?—A. The majority of them live within a radius of 20 miles.

Q. They live in Toccoa, Cornelia, and various other small towns around here, and on farms in that neighborhood; is that correct?—A. That is correct.

Q. How do they get back and forth to work?—A. Some in their own conveyances, some by bus, some by riding with others; share the ride plan.

Q. Now, the plant of the Company is located on which side of this highway?—A. On the northeast side. The directions are a little askew out there.

Q. And is the plant enclosed by a fence?—A. The plant proper is enclosed by a fence.

Q. What sort of a fence?—A. It is a link wire fence.

Q. About how high?—A. I think it is six feet with two barb wires on it, if I am not mistaken.

Q. On the top?—A. That is right.

Q. And how far is that fence from the highway; on the highway side of the plant?—A. The distance varies. At one point it is probably 30 feet from the highway; but varied, I should say, along the highway, according to its angles there, to maybe 100 feet.

Q. Are all the plant facilities enclosed within this fence?—A. I think we should say that the plant facilities are enclosed within the fence.

Q. What do you have outside of the fence?—A. Across the highway is a filling station, and a new store which is in the building; I mean in the process of building.

Q. You mean in the filling station building?—A. In the filling station building; yes, sir. And all of our dwellings.

Q. Do you have any parking lots for your employees out there?—A. Yes; we have parking space.

89 Q. Where is that located?—A. In front of the plant, and part of it across the highway.

Q. You mean, when you say in front of the plant, you mean between the fence and the highway?—A. That is right.

Q. It is not inside of the fence?—A. No parking space inside of the fence.

Q. The majority of the parking space is on the same side of the highway as the plant; is that correct?—A. Yes; the majority of it.

Q. And that is where most of the people park their cars when they come to work; is that correct?—A. I had rather not make an absolute statement on that, because I don't know whether it is a majority or not, but just offhand I would say yes; the majority are on that side.

Q. But a large part of them?—A. Yes.

Q. Is that also where the busses stop?—A. The busses stop there also; yes, sir.

Q. Between the fence and the highway; is that correct?—A. That is right.

Q. How do the employees get in and out of the plant itself?—A. You mean out of the fence?

Q. Yes.—A. We have an entrance gate, and by virtue of their passes they enter on the inspection of the guard.

Q. Do they all go in one gate?—A. All go in one gate, with the exception of the manager's car, and maybe another or two, which may go in the gate on this highway I just spoke of that is not paved that intersects with 13.

Q. How far is this gate that the employees go in from the highway?—A. I should say 100 feet.

Q. And that is through the fence on the highway side of the plant, is it not?—A. I don't get your question.

Well, I will rephrase it.—A. Yes; I get it. That is true. The gate is on the highway side.

* * *

Q. Yes; that is what I asked. Well, how long is this fence on the highway side?—A. Approximately a thousand feet, that is, on both sides of the highway that intersects it; the two sections of the fence.

90 Q. The plant is on the northeast side of the highway; is that right?—A. That is right.

Q. What I would like to know is how long the fence is that runs along highway 13?—A. Well, that is what I have answered. It is in two pieces. One piece runs from this end of the plant up to the road, and then the other end of the fence begins at the middle of the office building and runs on down to the other corner; to the far corner of our plant.

Q. The highway does not pass through the plant; it is parallel with the plant, isn't it?—A. The entire plant is divided into two sections. One is on one side of the plant—I mean of the highway of the road, and the other is on the other. The main part of the plant is east of this intersecting road.

Q. Yes; but I am talking about Highway 13. Highway 13

Q. And all of the plant is on one side of that highway?—A. sir.

Q. And all of the plant is on one side of that highway?—A. That is right; on one side of that highway, and the fence runs along that highway.

Mr. WHEELER. For the sake of clarity, don't you think it might be stipulated for the record there that when this witness speaks of the northeast side of Highway 13 he means going from Toccoa north.

Mr. KUELTHAU. Yes.

Trial Examiner FELDESMAN. It is so stipulated, and the stipulation is accepted.

By Mr. KUELTHAU:

Q. Now, you say it runs a thousand feet, then, along Highway 13, and has a break in it?—A. That is right.

Q. At one point, where this other roads comes in?—A. That is right.

Q. Well, you mean that from the fence to the road—to the highway—is solid concrete for a thousand feet along there?—A. No, sir. I mean that part that is in front of the office.

Q. That part in front of the office?—A. Yes.

Q. Is that where the employees park?—A. Yes, sir; where part of them park.

Q. Part of them park?—A. Yes, sir.

Q. Many of them?—A. Oh, I would say forty cars can park there.

Q. How is the rest of the space between the highway and the fence landscaped?—A. Beyond the part that is in front of the office building, and in front of the cafeteria—I mean the part in front of the office building is concreted. Beyond that, and in front of the cafeteria, it is just gravel, but that is also a parking space.

* * *

Q. Is the office in a separate fence from the remainder of the plant?—A. No; it is included.

Q. This road that intersects and splits the plant up, where does that—does that divide the plant into two parts?—A. Yes, sir.

Q. And tell us about that separation?—A. The main part of the plant is east of this intersecting road. Then on this side, or west of that intersecting road, is our steel factory and storage yard for the scrapers, and our machinist school and the warehouse.

Q. Well, is the office over there too, or is that in the other plant?—A. No; the office is in the east part.

Q. Well, when you testified that all of the employees went in this one gate, which part were you referring to?—A. The east part.

Q. How do the employees of the west part go in or out?—A. I won't answer that positively, but it is my understanding now that all of the employees enter the main gate and pass from the main building over to the foundry.

Q. You mean they have to go out of the fence, and then through another fence; is that right?—A. That is right. There is a fence on the other side of the road, and they leave the east half and go across the road to the west half.

Q. Do the employees punch time clocks?—A. Yes, sir.

Q. Where are those located?—A. They are located just beyond and inside of the gate.

Q. The main gate?—A. The main gate.

Q. So that in order to punch in and out all employees have to go in and out of that main gate; is that right?—A. So far as I know, all of them.

* * *

92 Cross-examination by Mr. WHEELER:

Q. Speaking of the conveyances of the employees of the plant, you mean by that automobiles, motor vehicles?—A. Yes, sir; and motorcycles.

* * *

Q. Now, there is something like between two and three hundred automobiles parked out there in front of this plant almost every day, aren't there, and night?—A. I would say there are this many.

Q. The Company, in order to protect those automobiles and to avoid confusion, keep guards out in there on both sides of the road in the parking lot, to keep an eye on the situation around the entire space used by the men for parking purposes?—A. Yes, sir.

Q. Do you recall complaints some year or so ago about articles being stolen out of these automobiles, when it became necessary to place guards out there?—A. I heard of it.

Q. You do know that because of that fact it was necessary to place guards out in the area used by the employees to protect their vehicles?—A. Guards were placed there.

* * *

Q. All right, sir. You stated that a part of the ground there, as I understand it, had been torn down, trees taken off of and that it had been leveled up. What was the object in that, if you know?—A. Well, the original object was simply to level off the land where the plant stands and all in front of the plant to the road.

Q. Was that space one of the facilities used by the employees in parking their vehicles?—A. Yes, sir; that *that* is in front of the cafeteria.

Q. Is that or not confined to one side of the road, or is it on both sides on Highway 13?—A. It is on both sides of the road now.

Q. You are speaking of Highway 13?—A. Highway 13; yes, sir.

Q. If you know, Mr. Witness, the facilities across the road for parking purposes, that is, across State Highway No. 13, are used by what percentage of employees, by what proportion of
93 them over there use it for parking purposes?—A. My estimate would be between 10 and 20 percent.

Mr. WHEELER. That is all, sir.

Redirect examination by Mr. KUELTHAU:

Q. You would say then that 80 percent of the employees park between Highway 13 and the plant fence; is that right?—A. No; I would say probably 60 to 70 percent, and then perhaps 20 percent across the highway, and then I know they park up and down the road at other places sometimes.

Q. Out of the road, on the shoulder?—A. No; I would not say on the shoulder. I do not think I have seen any of them parking on the shoulder of the road.

* * *

By Trial Examiner FELDESMAN:

Q. Now, with respect to this intersecting highway, can you tell me if the side gate opens up on that intersecting highway, of the plant?—A. Yes, sir. And there is a corresponding gate then into the property across that road.

Q. That is the gate through which employees pass upon going to the foundry?—A. Yes, sir.

* * *

Re-cross-examination by Mr. WHEELER:

* * *

Q. And you, therefore, have prohibited people from bringing any reading material into the plant?—A. There is no rule prohibiting the bringing of any reading material that I know of.

Q. Well, is it not true that one time the foreman of the machine shop announced to the assembled employees of the machine shop that thereafter they could not bring any reading material into the plant?—A. I never heard of it.

Q. So that the Company has no objection to their bringing reading material into the plant; is that correct?—A. The Company has not prohibited the bringing of reading material into the plant that I know of.

Q. Does the Company have any objection to bringing reading material into the plant?—A. The actual bringing in
94 of it—I would rather state it this way: That the objections of the Company are set down in the Company's rules.

Q. Well, answer my question, if you can. Does the Company have any objection to anybody bringing reading material into the plant?—A. I have never heard it stated.

Q. You have no objection, then?—A. I have never heard it stated.

Q. Aren't you the personnel manager?—A. I am the industrial relations manager.

Q. And you don't know, then, if the Company has any objection to bringing reading material into the plant; is that correct?—A. I never heard any member of the Company say that he objected to bringing in reading material into the plant. I never heard of it.

Q. Did you ever hear him say that he objected?—A. No, sir.

Q. Do you know, or don't you, if the Company objects? I am referring to the supervisory force, and I am not referring to Mr. LeTourneau himself.—A. The actual bringing into the plant, I would say no.

Q. It is the reading of it during working hours when they ought to be working that the Company objects to; is that right?—A. That is right.

Q. As a matter of fact, the Company itself distributes literature in the plant, doesn't it?—A. We place our "Now" magazine in places where the employees can get them, in little boxes. We do not distribute them.

Q. Well, how many of these boxes do you have?—A. I don't know.

Q. One in each department?—A. No.

Q. Where do you have them?—A. We have one in the office, and one in the—one just inside of the main entrance door. I could not say where the others are.

Q. And the purpose of those boxes are so that the employees can pick up this magazine and read it at their leisure; is that correct?—A. Yes, sir.

Q. This "Now" is a magazine published by the Company for its employees?—A. That is right.

* * *

95 Q. You testified that employees, that about 20 percent of the employees park their cars across the highway from the plant, and that 60 percent or 70 percent of the employees park their cars between the fence and the highway, that is, Highway 13, on the plant side of the highway. Would you say that there is another 10 or 20 percent who park their cars at the side gate,

that you have described?—A. There is no parking at the side gate. There is an area south of that side gate where there are some cars parked, and there is also some parking done on LeTourneau Court, which is a street in the house section. It is hard for me, without having made a count, to make an estimate. I expect I estimated a little low when I said 10 to 20 percent on the opposite side, because since we did start guarding there several months ago, there is probably 30 percent of it done over there. I think that is a rather rough figure. I could not say, as I never counted them.

Q. But there is a very small percentage of the employees who park their cars in the other two places mentioned, that is, the place south of the side gate, and on the street that you have just mentioned; is that right?—A. Yes. That probably amounts to 10 percent.

Q. Now, this place that is south of the side gate, is that in front of the plant premises?—A. Generally speaking; yes, sir. It is not a very long section, but it is practically perpendicular to the highway.

Q. And is that between the fence and the intersecting highway?—A. Yes. There is a jog there, that goes around the fence.

* * *

L. Wayman Ayers (Board witness).

DIRECT EXAMINATION

* * *

Q. Where do you work?—A. LeTourneau Company of Georgia.

Q. You will have to speak a little louder, I think.—A. LeTourneau Company of Georgia.

Q. How long have you worked there?—A. Just a little bit over four years.

96 Q. Do you belong to any Union?—A. I do.

Q. What Union?—A. United Steelworkers of America.

Q. How long have you been a member of that?—A. About sometime about the middle of May; I don't remember just the exact date.

Q. May, of this year; is that correct?—A. Beg your pardon?

Q. May of this year?—A. May, of this year.

Q. And were you interested in any Union before you joined the United Steelworkers of America?—A. I was.

Q. What organization was that?—A. That was the CIO; the Congress of Industrial Organizations.

Q. And when had you become interested in that organization?—A. About——

Q. Approximately?—A. About March 15.

* * *

Q. Now, at that time did the Company have any rules posted about the conduct of its employees?—A. I don't recall.

Q. Do you know when any rules were posted?—A. Well, I don't know. As well as I remember, it was along in April, I believe.

Q. It was in April that the rules were posted, or was it before, then?—A. I don't remember any before that.

Q. I show you, Mr. Ayers, a mimeographed sheet marked as "Board's Exhibit 2" for identification, and ask you whether those are the rules to which you have referred?—A. It is.

Q. This Board's Exhibit 2, you say, was posted along about the beginning of April; is that correct?—A. I imagine so. I could not state the exact date. It was somewhere along there.

* * *

By Mr. KUELTHAU:

Q. Do you recall an election held by the National Labor Relations Board during 1943?—A. I do.

Q. Do you remember the date of it?—A. April 8.

* * *

Q. That was on April 8; is that correct?—A. It was.

Q. Do you recall whether or not the CIO distributed any literature that day?—A. Yes; there was.

97 Q. I show you a mimeographed sheet marked as "Board's Exhibit 3" for identification, and ask you whether or not you recall whether that was the literature distributed on that date of the election by the CIO?

* * *

A. That is the one.

Q. Now, after the election did the CIO continue in the plant?—A. Not the CIO.

Q. What happened?—A. Well, the United Steelworkers of America, affiliated with the CIO, began to organize.

Q. The CIO lost the election; is that correct?—A. The CIO lost the election.

Q. Do you know when it was that the Steelworkers came in?—A. About March 1.

Q. You mean——A. Of this year.

Q. The Steelworkers came in about March 1?—A. Something like that; on or about.

Q. When was the election?—A. I mean not March; but May. I beg your pardon.

Q. About May 1?—A. May 1.

Q. And did you become active in the United Steelworkers?—A. I did.

Q. Did you hold any office in the Local?—A. Not at that time.

Q. When did you become an officer?—A. About July 9, I think it was.

Q. What office?—A. President.

Q. Were you elected President?—A. Yes, sir.

* * *

Q. Now, did you continue to work for the Company, for Le Tourneau Company, all during July?—A. No; not every day.

Q. What happened?—A. I was laid off two days.

Q. Do you recall when you were laid off for two days?—A. It was on a Saturday and Monday, 17th and 19th.

Q. Those were the days you were off; is that correct?—A. Yes, sir.

Q. The 17th and 19th of July?—A. It was.

98 Q. Tell us how you happened to be laid off?—A. Well, I was out on Thursday; Thursday evening, after I finished work——

Q. That would be the 15th of July?—A. That was the 15th; yes. I went to Mr. Joe Salvador.

Q. Who is he?—A. He was plant manager. I asked him for permission for some handbills as I had some to hand out, on the meeting on the 17th.

Q. You mean the Steelworkers?—A. The Steelworkers. And knowing the rule——

Mr. Wheeler. Speak a little louder, Mr. Witness.

The Witness: I knew the rule that prohibited the distribution of handbills about the plant without permission of the plant manager, so I went in to him to get permission, and he said that he could not give me permission to distribute them out and to post them on the bulletin board.

Q. You asked him for permission to put them on the bulletin board?—A. I did.

Q. And he said you could not do that?—A. Yes.

Q. Is that right?—A. And neither could I distribute them around the plant.

Q. You mean inside the fence?—A. That is right.

Q. Did he say anything more now to you?—A. Well, I don't know the exact words. We talked about it. He said that they might get in trouble if they were to let the gap down and give.

me permission to hand out those handbills, and that would let the gap down, and might get them in trouble with the Government, that they were not supposed to have anything to do for the Union or against it, and he said for that reason he could not give me permission.

Q. Did you say anything to him about any distribution outside of the plant?—A. Then I asked him how far did the Company's property go, and he said that he knew it was inside of the fence, but he did not know how far out toward the highway it went. So I thought, or I took it for granted that they did not own no farther than out towards the highway. So on Friday, the next day, at noon, I was on the south side of the highway distributing out the handbills.

99 Q. That is on the opposite side of the plant; is that correct?—A. It is.

Q. Where were you standing?—A. I was on, I guess, about 20 or 25 feet from the center of the highway, when one of the guard——

Q. What were you doing there?—A. Distributing out handbills.

Q. Were you just throwing them around?—A. No; I was putting them in cars.

Q. And handing them to people?—A. I was.

* * *

Q. This was during your lunch period, was it?—A. It was.

Q. Was your car parked over there?—A. My truck was parked right up against the rail; right against the highway.

Q. Which side of the guard rail?—A. On the right side from here; on the south side.

Q. And it was also on the opposite side of the highway from the plant?—A. It was.

Q. Go ahead. What were you doing? Tell us how many you distributed, and so on.—A. Well, I don't know exactly how many it was, but, I imagine, about 25 or 30 I had put in cars. Some fellows were going to lunch, and I handed some to them as they went by, and they read them and threw them down, I reckon.

Q. I show you a handbill marked "Board's Exhibit 4" for identification and ask you if that is the handbill you had and you distributed, or a copy of the handbill your distributed?

* * *

A. That is it.

Mr. KEELTHAC. Mr. Examiner, these are of a different color, but the same wording; the same thing.

(Thereupon the document above referred to was marked as "Board's Exhibit 4" for identification.)

By Mr. KUELTHAU:

Q. While you were distributing this handbill, which was Board's Exhibit 4, to the various people, how long had you been doing that?—A. That day?

100 Q. Yes.—A. Well, when I went to lunch, that is when I gave those fellows that were passing by me those papers, and I went on and ate my lunch, and then after I eat my lunch, I came back to the truck and put my lunch box in the truck, and got me some handbills, and that is when I started distributing them in the cars.

Q. And what happened?—A. As I was going around to my truck to get some more, one of the guards ran up and says, "All right. Let's go." I asked him where to, and he told me to go see George Stokes or Joe Salvador, or something.

Q. Who is Joe Stokes?—A. He was Captain of the guards.

Q. He is one of the Company's guards?—A. He was.

Q. Where were these cars that you had been distributing handbills in?—A. They were on that same side of the highway.

Q. In the parking lot, were they?—A. Yes, sir.

Q. Go ahead. What happened? He said, "Let's go," and then what happened?—A. I told him I did not think there was any use of it, that I had already talked to Joe Salvador the day before, the evening before, and he said that didn't make any difference, and he says, "There is no use our arguing around here; either you go or I will take you." So I told him I was going, and we went on to the yard office. Stokes was not there at that moment, and he carried me in to Mr. Brown, I think. I don't know his rate, what rate he has; what his rating is.

Q. Is he one of the guards?—A. He is one of the guards.

Q. What happened there?

* * *

A. I don't know the exact words.

By Mr. KUELTHAU:

Q. Well, tell us in substance what he said. You don't have to tell us the exact words.—A. He said, "Don't you know you should not be doing that?" That is not the exact words, but that is what he meant.

* * *

Trial Examiner FELDESMAN. Try, Mr. Witness, to tell us in substance what he said. You do not have to remember his exact words.

101 The WITNESS. Well, he—I don't know hardly how to put it, but he said that I should not be doing that, and asked me did I know that was against the rules, Company rules, and I told

him that I was not on the Company property, and he asked me where I was. George Stokes came in about that time, and I asked him how far the Company property went, and he asked me where was I, and I asked him again how far out did the Company property go, and he said, "That is not what I asked you. You answer my question." So I told him I was on the yonder side of the highway. We were in the guards' office at the time. And he said, "Well, that is on Company property." So he said, "I guess we better go to see Mr. Salvador." And we went in to see Mr. Joe Salvador, and we told him, or he did, what I had been doing, and then I told Mr. Salvador that I was out distributing these out, but had asked him for permission the day before, and he remembered it. There wasn't much said about it then. He said we had better go see—Mr. Joe Salvador told us we better go see Mr. Jack Salvador about it. We went to see Mr. [illegible]ck, but he was not in, he was out to lunch, or somewhere, he was out of his office. We waited a few minutes, and he did not come in, and Mr. George Stokes asked me what time was I supposed to go to work, and I told him it was past my work time, and he told me to go ahead and go to work and he would see Mr. Jack, and he would call whenever he came in. Well, I waited around, I thought maybe he would call me in just a moment. About 4 o'clock, as well as I remember——

Q. Did you go to work?—A. I did.

Q. You worked all afternoon?—A. I did. I was about ten minutes late for it; my regular work time. In other words, I did not get back to work until about ten minutes after the whistle blew. But I went in and my foreman asked me where I was, and I told him. Then about 4 o'clock my general foreman, Mr. Orville Dubie, he called me over to his desk and showed me a card which George Stokes had sent out, had his name signed to it, that I was suspended for two days, stating on it what I had done, where I had been caught. Mr. Dubie asked me to sign the card. I told him I did not want to sign it until I talked to Mr. Jack Salvador.

102 I went in to talk with him after work hours that evening, and he said that there had been two other fellows laid off for the same purpose, and he was sorry it was me, but he would have to just lay me off too. So I did not go back to work the next day. That was Saturday, the next day was Saturday, and then Monday I did not go back to work, and Tuesday I went back to work.

* * *

Q. Now, since that time have you distributed any Union literature?—A. I have.

Q. And where have you done that?—A. Out on the highway.

Q. On the highway itself?—A. On the highway itself.

Q. Where? The shoulder?—A. On the shoulder.

Q. Both places?—A. Yes, sir.

Q. Can you reach all of the men by distributing it there?—A. No; I cannot.

Q. Why not?—A. Well, part of the men, they didn't even come out to the highway to get on the bus, the Company bus, there are two or three that goes to town, and they don't even come out to the highway, and a lot of fellows going in cars, they don't come out to the highway, but we catch a few of them when they come out from the parking lot to the highway.

Q. Have you been able to distribute the literature near the gate where the men come out?—A. No, sir.

Q. You have to stay out on the highway; is that correct?—A. I do.

* * *

Cross-examination by Mr. WHEELER:

Q. You went to work for LeTourneau Company when?—A. October 9, 1939.

Q. Have you worked continuously since that time?—A. Not every day.

Q. I mean have you had any other employment other than that?—A. No, sir.

Q. That has been your regular job?—A. It has.

* * *

Now, on July 15 I understood you to tell Mr. Kuelthau that you went in to Mr. Joe Salvador and requested permission
103 from him to post these circulars on the bulletin board and distribute them in the plant?—A. I did.

Q. You know before you went that the Company had a rule against distributing circular and advertising matter of any kind in the plant?—A. About the plant, that is right.

* * *

Trial Examiner FELDESMAN. Let's look at the Exhibit.

Mr. KUELTHAU. Rule 24.

Trial Examiner FELDESMAN. I will sustain the objection. But I will indicate to you, Mr. Wheeler, that you should rephrase your question, if you have reference to Board's Exhibit 2, in questioning the witness.

Mr. WHEELER. I do not have reference to that. I have reference to another rule that was in force at that time, which I expect to introduce and show later that the rules were in force, and that that is the old rule. And I think I have a right to show by this witness, if I can, that he is familiar with this rule, on cross-examination.

Trial Examiner FELDESMAN. In that case, I will overrule the objection. Answer the question.

Mr. KUELTHAU. Well, Mr. Examiner, may I suggest that he be shown the new rule, if he is looking at the wrong rule.

The WITNESS. This is the rule that came out after the election.

By Mr. WHEELER:

Q. That came out, though, before July 15?—A. Yes.

Q. And at the time you went to Mr. Salvador you were familiar with that rule 24 that you hold before you right now?—A. Yes, sir.

* * *

Mr. WHEELER. For the purpose of the record, I will read rule No. 24, under the heading "Violation of the following Rules will be cause for immediate discharge," rule 24 being in this language: "Posting or distributing handbills, placards, posters, or advertising matter of any nature about the plant without permission of the plant manager."

* * *

104 By Mr. WHEELER:

Q. You went to Mr. Salvador, Mr. Joe Salvador, and requested permission to place these handbills that have been introduced in evidence as Board's Exhibit No. 4, seeking permission to place them on the bulletin board in the plant, and distribute them in the plant and on the grounds about the plant?—A. In the plant is where I asked him to distribute them.

Q. You asked permission to distribute them in the plant?—A. I did, and put them on the bulletin board.

Q. And to put them on the bulletin board?—A. Yes, sir.

Q. He told you that the policy of the Company was not to take sides in the promotion of the Union, or influence those that did not want to belong, but to leave the employees to do as they please about such matters?—A. That is right.

Q. And that there was a rule against distributing literature of any kind in the plant, and if he made an exception in your case it might lead to trouble; that is in substance what he told you?—A. That is what he said.

Q. He told you he could not grant you that permission?—A. He did.

Q. Then you asked him how about distributing these on the grounds outside of the plant?—A. No; I did not ask him that. I asked him how far out the plant property went.

Q. The plant property?—A. Yes, sir.

Q. Now, he requested that you go to see Mr. George Stokes?—A. That is right.

Q. Now, you knew who Mr. George Stokes was?—A. I did.

Q. You knew that he was a Captain of the guards there?—A. Yes, sir.

* * *

Q. But you do know that Mr. George M. Stokes was Captain of the guards?—A. Yes, sir.

Q. And he was the man that Mr. Salvador requested you to go to for the information about the extent of the grounds?—A. He was. It was to see how far out toward the highway it went.

Q. You did not go to Mr. Stokes, did you?—A. No; I did not.

105 Q. You distributed some of these handbills between the plant and the road as you went out?—A. No, sir.

Q. You did not do that?—A. No, sir. They were in my truck. I had to go across the highway to get them.

Q. Well, didn't you catch some of the employees as they came out of the plant before they got to the road and give them some of them out there?—A. No, sir.

Q. Well, you did hand them to a number of employees as they came out there in the parking lot?—A. Out there where my truck was.

Q. And the Company, through its own employees and at its own expense, keeps the ground out there where this parking is done cleaned up, don't they?—A. Well, down on the fill they don't.

Q. I am talking about the parking space there where automobiles are parked?—A. Yes, sir; they do that.

Q. The Company at its own expense kept the debris and accumulation of things that accumulates out there by throwing down cigarettes stubs and various other things—that is kept cleaned up by the Company?—A. It is.

* * *

Q. Now, prior to October 1942, the merchants and various people just flooded that place out there with their advertising materials, didn't they?—A. I don't know about that.

Q. Well, you do know you had a lot of that advertising material out there in the cars, don't you?—A. There was some in my car.

* * *

Q. Now, after Mr. Salvador had told you to go see Captain Stokes, you did not go to see him?—A. No; I did not.

Q. You just went on out there and started distributing this literature to people as they came out of the plant for their lunch?—A. Out on the highway where my truck was parked.

Q. Well, you were over there in the space where they park their automobiles, weren't you?—A. I was right beside my truck.

Q. Well, right where your car was parked there were others parked close by?—A. That is right.

Q. Then you went to distributing this literature in these other automobiles?—A. I did after I had eaten lunch.

106 Q. After you had eaten lunch. And you had already distributed one armful, and had gone back to get another?—A. I had.

Q. Had gone back?—A. Just a handful.

Q. To get another. You knew when you did that, that you were violating the rule of the Company, or you thought you were, didn't you?—A. No; I did not.

Q. Didn't you tell Mr. George Stokes when you were back in there that you knew you were violating that rule, but Mr. Joe Salvador told you to go and see him?—A. I did not tell Mr. George Stokes I had violated a rule.

Q. Did you tell him Mr. Salvador had asked you to go to see him?—A. I did.

Q. Why didn't you go to see him?—A. Well, I don't get but thirty minutes for lunch, and I thought I would go out there and eat my lunch and distribute them on that side. I didn't think I was—I was almost positive that the Company did not own that out there, because that was not plant property. So I decided to distribute them out there, and then go ask Mr. Stokes for permission to distribute some where the Company plant property was, on the north side of the highway.

Q. Do you know now that that was Company property out there?—A. I didn't know that it was.

Q. Did you know that it was not?—A. I didn't know that it was not.

Q. Don't you know that the Company owns and controls land on both sides of the road there for practically a mile?—A. I don't know that.

* * *

Q. Mr. Ayers, did you know about back in 1942 several of the employees complaining of having articles stolen out of their automobiles out here?—A. I don't know anything about it.

Q. You do not know anything about that?—A. No, sir.

Q. Do you know when the guards were placed out there to guard these automobiles?—A. No; I don't. I don't remember exactly.

Q. It had been some time before you distributed this literature?—A. Well, I don't know that they were placed out there to guard automobiles.

107 Q. What were they doing out there?—A. I imagine they were out there just—just to see if anybody was looking around, or trying to get into the plant some way, or looking around to see about getting in.

Q. According to your understanding they were guarding the premises out there, looking after the premises?—A. I guess they were.

Q. Do you remember some men being seated over on the bank at the back of the parking lot, eating their lunch that day?—A. There was some over there. I ate dinner with them.

Q. Did you have some literature over there?—A. I had some in my pocket.

Q. You gave it to them over there?—A. I handed it to them as I went over there.

Q. As you went over there?—A. Yes, sir.

Q. And that is about 60 or 70 feet from the highway, isn't it, over at the back of that bank there?—A. No, sir.

Q. Well, about how far would you say?—A. I would say it was 40 or 50; I don't remember how far, but somewhere between 40 and 50.

Q. It was entirely across the area that was used for parking—it was on the far side of it from the highway?—A. Well, it was right at the edge of it.

Q. Well, it was the far edge from the highway?—A. That is right.

Q. On the parking space?—A. That is right.

Q. In other words, it was as far as the space could be used for parking purposes?—A. Yes.

Q. You went to the outer edges of the parking space from the highway?—A. I did, to eat my lunch.

Q. And distributed literature out there as far as you could find anybody to hand it to?—A. No; you are mistaken.

REDIRECT EXAMINATION

* * *

By Mr. Kuelthau:

Q. Did you see any paper around the parking space where your truck was parked and where you were distributing
108 literature?—A. I don't remember then. Do I see any now? Is that what you want?

Q. Yes.—A. Oh, yes.

Q. Any scraps lying around?—A. Yes, sir; from lunch and all.

Q. What do people do with paper that their lunch might be wrapped in?—A. Well, some of them—they have containers provided to put that garbage in, and some put it in there, and some just throw it down on the ground.

Q. Does the Company have a man that goes around and picks up that paper?—A. I don't ever see anybody going around, but

it gets gone. I don't know whether the wind blows it away or somebody picks it up.

Q. Does the Company have a rule against throwing anything down in that parking space?—A. I don't know about the parking space, but in the plant——

Q. No; I am talking about the parking space. Do they have any rule that you could not throw paper on the ground out there?—A. Not that I know of.

Q. They have got those containers around, though, for you to put it in?—A. That is right.

* * *

Re-cross examination by Mr. WHEELER:

Q. They do keep the grounds clean, and you do not find it littered up and remain there for days?—A. Well, no; not for days.

By Trial Examiner FELDESMAN:

Q. Mr. Witness, I have a few questions to ask you. You have mentioned a Jack and Joe Salvador.—A. That is right.

Q. Who is Joe Salvador again?—A. He is the plant manager.

Q. And who is Jack Salvador?—A. He is the Vice President and General Manager of the Company.

* * *

Q. How many handbills did you distribute on the 16th—that is, to people and not in cars—about?—A. Oh, about eight or ten. I guess, not more than that many.

* * *

109 GRADY FERGUSON (Board witness).

* * *

DIRECT EXAMINATION.

* * *

Q. Where do you work?—A. LeTourneau Company of Georgia.

Q. How long have you worked there?—A. I have been working there two years, the 27th of last July.

* * *

Q. Well, do you recall the day of the election the Board held there?—A. Yes, sir.

Q. Were you laid off that day?—A. I was laid off the day after that.

Q. The day after that?—A. Yes, sir.

Q. Tell us how it happened that you were laid off.—A. Well, after quitting time I came out to the bus——

Q. When was this; on the day of the election?—A. On the day of the election. And it was after 5:30, and there was some hand-

bills in the bus, in the glove compartment. I told them to hand me one, I wanted to see them, and a fellow handed me a whole handful of them. So somebody in the back of the bus wanted some, and I handed them back there, and then I stuck, I guess, four or five out of the window.

Q. You mean threw them out?—A. No; handed them to people out of the window.

Q. And where was the bus?—A. It was about half way between the plant and the highway.

Q. You mean between the fence and the highway?—A. Yes, sir.

Q. And you were in the bus?—A. I was in the bus.

* * *

Q. Do you know what sort of handbill this was?—A. The handbill I had had CIO in big letters at the top.

Q. But it was a CIO handbill?—A. It was a CIO handbill.

Q. What happened to you?—A. Well, Captain Stokes saw me hand some out of the window, and he came out and asked who it was, and I told him it was me, and he asked me to come
110 to the guardhouse, and I went with him, so he tried to get Mr. Joe Salvador and could not get him, and he told me to come back the next day and see Mr. Salvador.

Q. Did you do that?—A. Yes, sir.

Q. Go ahead.—A. Mr. Salvador, I went in that morning, and he said he would have to lay me off, because he had done that before, and he said he would have done the same thing if it had been a chicken sale, or something like that, advertising of any kind.

Q. And he laid you off for two days?—A. Yes, sir.

* * *

JACK SALVADOR (Respondent's witness).

* * *

DIRECT EXAMINATION

* * *

Q. You are vice president and general manager of Respondent in this case?—A. Yes, sir.

Q. How long have you held that position?—A. I have been general manager of the LeTourneau Company of Georgia since its origin, which was in 1938, December of 1938.

Q. Mr. Salvador, are you familiar with the notice attached to your answer in this case and marked as Exhibit A, dated April 1, 1943?—A. Yes, sir.

Q. Does that or not correctly state the policy of your company toward labor employed by you at that plant?—A. Yes, sir.

Q. Within the period of, say, since October 1942, will you state for the record the general nature and type goods you have been manufacturing, if any, for the Government of the United States?—A. We have had a contract with the Ordnance Department for the manufacture of shells, and we have had a contract with the U. S. Army Engineers for road grading equipment, sheep's foot rollers, graders and scrapers.

* * *

Q. Were you familiar with this parking ground across the Highway No. 13 from your plant there?—A. Yes, sir.

Q. State for the benefit of the Examiner whether or not that ground where the parking is done across the Highway No. 13 from the plant is and has been for some time under the supervision and control of your plant there?—A. Yes, sir.

Q. Do you have it policed and guarded?—A. Yes, sir.

* * *

By Mr. WHEELER:

Q. Mr. Salvador, about how long has the supervision of the parking lot across from your plant, that is, across Highway No. 13 from your plant, how long has your company been supervising that parking space over there?—A. I don't know the date, that the company has been supervising it, but the company built that parking lot there for parking space for our employees.

Q. Have they been supervising it ever since it was built?—A. Yes, sir; ever since it has been built.

By Trial Examiner FELDESMAN:

Q. Is the title to the property which comprises the parking lot across from the plant on Highway 13 in the Respondent's—A. I wish you would repeat that.

Q. Does the Respondent have title to the premises comprising the parking lot across from the plant on Highway 13?—A. Now, when you say title, do you mean do we own it, or do we have—

Q. That is right. I mean, do you own it?—A. I don't think we do own it. We do have a lease on it. We have permission to use it.

Trial Examiner FELDESMAN. Thank you.

By Mr. WHEELER:

Q. Mr. Salvador, I show you a special order, unnumbered, dated July 3, 1941, and ask you whether or not you O. K.'d such an order as that, and whether it was posted?—A. Yes. I asked Mr. Stokes to take such action.

Mr. WHEELER. I will let the reporter identify it.

(Thereupon, the document above referred to was marked "Respondent's Exhibit 3" for identification.)

Trial Examiner FELDESMAN. If I may interrupt, when was this posted, Respondent's Exhibit 3 for identification?

The WITNESS. It is dated July 3, 1941.

Trial Examiner FELDSMAN. Was it posted then, to your knowledge?

112 The WITNESS. Well, I could not say. However, we are in the habit of posting those when they are made up.

By Mr. WHEELER:

Q. Is it your custom for you to give an order and the other fellow to do the posting?—A. That is generally the way it is done; yes, sir.

Q. Are those orders usually carried out when they are given, at the time they are given?—A. Yes, sir.

Q. You instructed Mr. Stokes?—A. Yes, sir.

Q. To post this order?—A. I instructed Mr. Stokes to post that order because the yard was so badly littered up with all kind of advertisements and sales posters, and so many different things, and newspapers, and most anything that could be left out there, and it left a terrible mess, so I instructed him we would have to discontinue the matter of allowing anybody to distribute any of

Q. To post this order?—A. I instructed Mr. Stokes to post the matter on the company property.

Q. That is, on the grounds?—A. Yes, sir.

Trial Examiner FELDSMAN. And that was on July 3?

The WITNESS. Yes, sir.

By Mr. WHEELER.

Q. Of 1941?—A. Yes, sir.

* * *

Q. Does the company, or not, keep the grounds between the plant and Highway No. 13, and that space beyond Highway 13 from the plant that is used for parking purposes, cleaned and supervised at its expense?—A. Yes, sir.

Q. Has that been true since that space has been used for parking purposes?—A. Yes, sir. Now, I might add there that before we built parking lots there for our employees there was a certain amount of parking there, but it was just haphazard parking. When it rained, they did not park there, but when it was dry they used it. But we built it into parking lots, and it has been under our supervision since we have built it into parking lots.

Trial Examiner FELDSMAN. You are referring to the parking lot opposite the plant on Highway 13, or are you referring
113 to the parking lot in front of the plant, between the plant and Highway 13, or are you referring to both parking lots?

The WITNESS. Both parking lots.

* * *

Trial Examiner FELDESMAN. Does the Respondent own that property between the fence enclosing the plant and the highway?

The WITNESS. Yes, sir.

Trial Examiner FELDESMAN. On the plant side of the highway?

The WITNESS. Yes, sir.

By Mr. WHEELER:

Q. How long have you held this lease, Mr. Salvador, to that part of the parking space beyond the highway No. 13 from the plant?—A. I couldn't say. It has been in effect for some time, but I don't remember the date.

* * *

CROSS-EXAMINATION

* * *

Q. Now, when this rule was put into effect, you say in July 1941, that was directed at what kind of handbills, posters, and literature?—A. When that rule was—all companies, after they are formed, make a policy of setting down certain rules, so that the employees and the personnel as a whole would know the company policies, the company rules, and I think every company does that.

Q. Just answer the question. Tell us what sort of posters, handbills, and literature was that rule directed against?—A. I would say concerning anything that would—that—that is not necessary for the welfare of the organization, or used in the company.

Q. What sort of literature had been distributed out there?—A. We don't allow the distribution of any literature in the plant.

Q. Just answer my question. What has been distributed out there?—A. None.

Q. None at all?—A. No, sir.

114 Q. Prior to that time?—A. None. You mean outside? You mean that has been distributed around the premises?

Q. I mean, what was the occasion for this rule?—A. The main one was a lot of handbills from the city here on sales, and different things like that.

Q. You mean where some merchant was having a sale?—A. That is right.

Q. He would distribute handbills out there advertising it?—A. That is right. And also from the show, from the city, from the merchants.

* * *

Q. Now, at that time were you distributing this company magazine?—A. That company magazine, I believe, has been in existence for a number of years.

Q. Were you distributing the company magazine at that time?—A. Well, it depends upon what you mean by "distributing." Those magazines are put into little boxes by the bulletin boards in the plant for the men to take home, if they like. They are not distributed.

Q. Did you do that in July of 1941?—A. I couldn't say when, but I would imagine so; yes.

Q. And you are continuing to do that up to the present time?—A. Yes, sir.

* * *

Q. And anybody that wants to come out to the plant can drive his car in there and stop it anywhere on the parking lot there?—A. We have a special parking spot for people to come and park there.

Q. Can anyone park in any of those lots?—A. Not unless they are connected with the organization.

Q. Who stops them?—A. Our guards do not allow other parking.

Q. If I drove out there, couldn't I park in that lot?—A. You could just for a short while, while you were doing business with the organization, but if you were not doing business with the organization you could not.

* * *

115 Q. It is just an open lot, and you drive in and park there; is that right?—A. That is right. But there are guards there to supervise those parking lots.

Q. Yes; but they do not care who parks there. If I drive out there, I could drive my car in there, park it, and get out and walk over to the company's office, couldn't I?—A. Yes; you could.

Q. And nobody would say anything?—A. They would not. If your car continued to stay there, though, they would say something about it.

Q. What do you mean, continue to stay there?—A. If your car stayed there, they would know it was not a company employee car, and they would investigate it.

Q. How would they know?—A. Well, it is very simple for our guards to tell, when they know practically everybody that works for the organization, and they know who is driving in and out of that parking lot.

Q. But they don't know when Joe Doakes buys a new car and drives it out there?—A. Sir?

Q. They don't know when Joe Doakes buys a new car and drives it out there?—A. You try it sometime.

* * *

Q. Now, do you have any rules against littering up those parking lots?—A. Yes, sir.

Q. Where are they? Where is that rule set out?—A. Well, the littering up of the parking would come in this one rule here, which says "littering up."

Q. Where—which one rule?—A. This one here, 22.

Q. 22 in Respondent's Exhibit 1?—A. Yes.

Q. Does that say anything about littering up the property?—A. Well, wouldn't you consider that littering up the property?

Q. I just asked you whether it said anything about littering?—A. No. That is true. It does not say "littering."

Q. Do you have any rule that says anything about littering?—A. In the sense of the word "littering," I would say not.

Q. Saying, "Don't throw paper on this lot"?—A. I would say that No. 22 would cover that.

116 Q. That is the only rule you have that covers littering?—A. Yes, sir.

Q. You have no other rule covering littering?—A. (No response.)

Q. Did you answer?—A. Sir?

Q. Did you answer the question?—A. I said "no."

Q. You have no other rule?—A. No.

Q. Did you have any signs up out there saying, "Don't throw paper on this lot; put it in this trash can"?—A. I could not answer that question. I don't know.

Q. You know you have not got signs like that, don't you?—A. I know there are cans to put trash in them.

Q. You know you do not have any signs saying, "Put trash in can and not on lot," do you?—A. No; I don't believe there is a sign up there like that. I have not noticed it, if it is.

Q. And if a man eats lunch there and unwraps a sandwich, he may or may not put it in the trash can; isn't that right?—A. The men know that they are to—that they should not scatter their papers around. Whether they do it or not, I don't know.

Q. You do not visit any penalty on them for not putting it in the can?—A. No; there is no penalty.

Q. And if a man finishes a package of cigarettes and throws the package away, if he is near the can it does not go in the can.—A. There is no such rule, a posted rule on that, but the foremen make a point of telling the men not to litter up the place.

Q. I am not talking about inside of the plant. I am talking about outside of the fence.—A. No; there is not.

Q. They can just throw their empty package where they please; isn't that right?—A. That is right.

* * *

Q. You have two shifts at the plant?—A. Yes, sir.

Q. What are they known as, day and night shift?—A. Yes, sir.

Q. When does the da shift start and end?—A. Well, it has been broken up. I think the morning shift starts at 7

117 o'clock, and ends at 5:30, and the night shift starts at 6:00 and runs—you see, they work eleven hours five days. It ends around 5 o'clock in the morning, doesn't it?

Mr. WHEELER. 5:30.

The WITNESS. 5:30.

By Trial Examiner FELDESMAN:

Q. And for how long has that situation existed?—A. For, I would say, most of the life of the organization.

* * *

Q. As I understand it, at the time Respondent's Exhibit 1 in evidence was issued, there was no parking lot across from the plant on Highway 13?—A. Exhibit 1 is the handbook?

Q. That is right.—A. No; there wasn't a parking lot across the road at that time.

Q. But there was one, as you have already testified, in front of the plant?—A. Yes, sir.

Q. On Highway 13, that is, the space between the fence and the highway?—A. Yes, sir. I might say between the office and the highway, which is practically the same thing. The office wall makes up part of the fence.

* * *

REDIRECT EXAMINATION

* * *

Q. Mr. Salvador, prior to the time you put guards out there, to guarding these parking spaces, did you have complaints made to you about the loss of articles out of these automobiles?—A. Yes, sir.

Q. Well, since you have put them under strict guard duty, have those things occurred since that time?—A. No, sir. It did happen once, but the fellow that was stealing the tire was caught.

Q. Was caught?—A. Yes, sir.

Q. As a result of your having a guard there?—A. That is right.

* * *

118 GEORGE M. STOKES (Respondent's witness).

* * *

DIRECT EXAMINATION

* * *

Q. By whom are you employed?—A. Le Tourneau Company of Georgia.

Q. How long have you been so employed?—A. Since April 15, 1941.

Q. What are your duties now? How are you designated?—A. I have two categories. My civilian duties are preserving the peace and enforcing the law, protecting lives and property, prevent and detect crime, and arrest all violations of the rules and regulations of the State of Georgia. Then I have another duty also that is handed to me by the United States Army, Internal Security Division, to carry out their instructions as to the protection of the plant, and in aiding them.

Q. You are now under the direct supervision of the military, insofar as guarding the plant and property it protects?—A. Yes, sir.

Q. Or manufactures rather?—A. Yes, sir.

* * *

Q. Mr. Stokes, I believe you said you went to work what time?—A. April 15, 1941.

Q. 1941. After you went to work out there, do you recall any complaints coming into the company, and coming to your knowledge, wih reference to pilfering and stealing of articles out of employees' automobiles that were parked on the premises?—A. My first job with that company, sir, was the recovery of an automobile that was stolen from the parking lot the day before I went to work there, an automobile, a Ford automobile, that was stolen the day before. And from that day on, for a period of a few months, until July 3 of 1941, every day we had a report of some kind on something being stolen, anything from a camera, to cigarettes, lunches, spare tires, tools, jacks, and such as that, from the automobiles, sir.

Q. Was that about the time that this rule embodied in Respondent's Exhibit No. 3 was promulgated by Mr. Salvador?—A. That was placed in effect more or less through my initiative, 119 sir. I had gone to Mr. Arthur, who was the industrial relations manager at that time, with these complaints, and also cluttering up the place, and asked that the rule be placed in to help me protect the automobiles out there on our parking places.

Q. Now, just prior to the time that rule went into effect, for the information of the Examiner, will you just please state what character of advertising and theft and so on was going on on the parking spaces, and how it was carried out?—A. About three or four days a week, possibly some weeks it would go maybe every day, we would have anywhere from one to ten merchants up here in

town sending 14- or 15- or 12-year-old boys out there to put out handbills advertising their sales, and they would throw the pamphlets in the car, if the car doors were open, and if they were not, they would hang four or five of these things on the door handle, put them under the windshield wiper on the outsides, and they would blow all over the place, and if the car was open, so we found out, they would throw a handful of bills in the car, and then drag out a jack or a few cigarettes on the way out.

Q. Now, in reference to the rule that you spoke of there, dated July 3, 1941, you say you conferred with Mr. Salvador and other officers of the company with reference to promulgating that rule?—A. Not with Mr. Salvador, no. I had my dealings through Mr. Arthur, who was the man over my department, and my business was strictly with him in getting the rule passed. But Mr. Salvador told me himself that the rule was in effect and not to permit it any longer.

Q. Now, was that order placed in your hands about the date that it bears?—A. This order was from me to my men. This order was not published on any bulletin boards in the plant. However, Mr. Stapleton, the personnel manager at the time, he sent out a notice to all the foremen, supervisors, and all bulletin boards, that that should not be permitted any longer around the plant premises. I do not have a copy of that, because at that time I did not have an office, and I had no way of keeping things that went through the plant. However, I did keep my own personal business in folders.

Q. Mr. Stokes, from your knowledge of what went on down there, (state whether or not that notice that was sent out substantially embodied what was in this rule there in the second paragraph about distributing literature and stuff on the premises?—A. Yes, sir; it did, to my satisfaction. I don't know it as the exact wording of it, but if——

Q. But in substance it gave notice——A. It advised the gist of the same thing I had ordered by guards to carry out.

Q. Now, then, after that rule was promulgated, and this notice was sent out, did you instruct the men working under you to prohibit the distribution of literature of all kinds in the automobiles on those parking lots and on the property?—A. Yes, sir; these instructions right here, to my guards.

Q. Did they carry out your instructions?—A. To my knowledge, they have been carried out to the letter, sir.

* * *

Q. Now, speaking, Mr. Stokes, particularly with reference to the parking space held under lease by the Respondent across

Highway No. 13, do you or not give instructions to the men working under you to guard and protect that lot, and have you been doing that since July 1942?—A. Yes, sir. We have a post and patrol on that road. In other words, that is all parking lot. That covers the one directly in front of the office, the one directly across the highway, on No. 13, and also over by the cafeteria, and that one down below the filling station; that is all under our supervision.

* * *

By Mr. WHEELER:

Q. Your directions about the literature was not directed to any particular literature?—A. No, sir. It was in order to help me watch that parking lot.

Q. Did you enforce that order with reference to all types of literature?—A. I have refused every merchant that has ever come out there from the city of Taccoa, and I have refused our legal adviser, Mr. Brannon—Mr. Brannon——

Q. Mr. Brannon, who is sitting here at the table?—A. Yes, sir.

Q. He undertook to distribute some religious literature, did he?—A. Yes, sir.

Q. And you prohibited that?—A. Yes, sir. And the Toccoa Falls Institute has been out there on a couple of occasions to put out tracts, and I refused them, and to my knowledge 121. there has been no permission given to any outside agent, company, or concern to put out literature on our property anywhere, and none has been put out with the exception of a few who got started before we caught them, and when they were told about the rules they picked their literature back up and got out.

Q. Now, is that rule enforced without reference to the type, kind, or character of literature, or the personnel who is engaged in distributing it?—A. It is; yes, sir.

* * *

Q. I say, have you undertaken to prohibit the distribution and posting or placing of literature of all kinds on the parking spaces out there, without regard to the type of literature?—A. Yes, sir.

Q. Does this include this parking lot that Mr. Ayers pointed out to you as the spot that he was distributing literature?—A. That includes all property of the LeTourneau Company of Georgia.

Q. How long have you adhered to that rule?—A. Since the 3rd of July 1941.

* * *

CROSS-EXAMINATION

* * *

By Trial Examiner FELDESMAN:

Q. As I understand it, Mr. Stokes, Respondent's Exhibit 3 was sent to all guards and guides?—A. Is that the one, sir, that was signed?

Q. That was signed by you.—A. Yes, sir; that was to my guards and guides only.

Q. Are guides part of the plant protection?—A. They were at that time; yes, sir. We had a couple of men who were not active as guards, and they were what we used to show people around through the plant, but anything that came within their sight or attention, they handled it. They had the same authority as guards, but we called them guides.

Q. You testified that on, or simultaneous with, the issuance of Respondent's Exhibit 3 that a notice went to other employees, and I believe you included foremen, and I don't remember whether you included the ordinary production and
122 maintenance employees.—A. The way that was headed was to the supervisors or foremen and bulletin boards.

Q. And what?—A. And bulletin boards, you see, to be placed on all bulletin boards throughout the plant.

Q. Do you know whether that notice was posted on the bulletin board?—A. Yes, sir; it was posted; I know, because I saw it.

Q. And that notice was very similar to Respondent's Exhibit 3?—A. Contains the same—I mean, the gist of the same thing; yes, sir. It was not the exact wording, because that was written by me, and the other was written by the personnel manager, Mr. Stapleton, at that time.

Q. I notice that on Respondent's Exhibit 3, paragraph No. 1 states that in order that the maximum amount of safety be given to the property of our employees while on the property of LeTourneau Company of Georgia, the below-named rule will be effective this date. At the time that you sent out this notice, did you also have in mind the fact that the company did not want the littering of its premises?—A. Yes, sir. In other words, that was—the whole thing was discussed, you see, the protection and the littering up of the place, and all of that was discussed in the conversation between the industrial relations manager and myself.

Q. Who was industrial relations manager?—A. Mr. Guy B. Arthur, Jr., at the time.

Q. Who else was present at the time?—A. Just he and I. In other words, I made my recommendation to him as to what he did in our guard forces, and he, in turn, went to the management.

* * *

Redirect Examination by Mr. WHEELER:

Q. You were Chief of Police of the guard force out there at the time, and the other guards were working under you?—A. I have been, sir, since the day I went to work out there.

* * *

TOM J. BORN (respondent's witness).

* * *

123 DIRECT EXAMINATION

* * *

Q. Mr. Born, by whom are you employed?—A. By LeTourneau Company of Georgia.

Q. In what capacity?—A. As a guard.

Q. How long have you been so employed?—A. Since March 23, 1942.

* * *

Q. When you were employed, were you instructed to guard the parking spaces out there against the intruders and people distributing literature, and such as that?—A. Yes, sir.

Q. Did that include the parking space across Highway 13 and in front of the plant, which is used by employees in parking their cars there?—A. Yes, sir; it included all parking spaces. Of course, it expanded all along as the employees increased.

* * *

Q. Mr. Born, did you find Mr. Ayers distributing some literature out there on that lot?—A. I saw him; yes, sir.

* * *

Q. Was it on the company's property reserved for the purpose of being used as one of its facilities for accommodating employees in parking their automobiles?—A. Yes, sir.

Q. Now, will you just in your own language state for the Examiner what occurred, what was done, and what Mr. Ayers said?—A. My station was at this side gate across that side road, and from where I was, I was looking right toward the service station and over there, and I saw Mr.—I didn't know who it was and what he was giving out—but I just saw somebody over there handing out some handbills, and after the men came back in there at 12:30, and another guard came around to relieve me, I walked over there and found Mr. Ayers at the back of his truck, and I told him—I said, "It is against the rules to give out any kind of literature on company property, and I guess you will have to go to the office with me." And he said, "This is not company property. This belongs to the Louise Farming Company." I said, "It is all the same company." He said, "I don't think I have violated any

rules." I told him—I said, "Brother, you are working in
124 the plant, you and me both working for the same company. You work inside and I work outside, guarding the company property. And I expect we better just go on to the office." He said, "Well, if you put it that way, we will go on." He had his arm full of circulars he got from the front of his truck, and he come back to the back part of the truck when I met him.

* * *

JIMMIE HAYNES (respondent's witness).

* * *

DIRECT EXAMINATION

* * *

Q. Do you have any knowledge about the time when that rule was dictated, when it was first conceived?—A. It was during the summer of that year, right after the date George mentioned.

Trial Examiner FELDESMAN. What year? 1942?

The WITNESS. 1941.

* * *

By Mr. WHEELER:

Q. What are your duties out there?—A. I am assistant to the industrial relations manager, and the particular scope of my work has been the setting up and distribution of bulletins.

Q. Do you happen to have in mind any particular person that Mr. Stokes enforced that rule against, who was inside of the plant, employed by the company?—A. I know that Cliff Brannon, of course, that instance, and I know personally a friend that I had outside of the plant, who came there for that purpose particularly, a man who represented a land selling outfit, and both of those were immediately instructed that that could not be done, and left the plant, or at least left the place without any distribution of literature.

Q. Do you know the type of literature that Mr. Brannon wanted to distribute there?—A. I saw a copy of it. It was in regard to a religious meeting, a religious type of literature.

Q. And it was prohibited by Mr. Stokes?—A. That is right.

125 Q. Was that before this incident of Mr. Ayers' and Mr. Furguson?—A. Quite awhile prior to that time, although I could not place a definite date on it.

* * *

CROSS-EXAMINATION

* * *

Q. Now, when was the first time any rules were posted on the bulletin board out there, any compilation of the rules, I mean;

do you know?—A. During October 1941, rules were distributed to all the employees.

Q. Was that the booklet?—A. That is the booklet; yes, sir.

Q. That was distributed in October 1941; is that right?—A. Yes, sir.

Trial Examiner FELDESMAN. That is Respondent's Exhibit 1 in evidence?

Mr. KUELTHAU. Yes.

The WITNESS. That is right.

* * *

Q. And that was posted then, that booklet then?—A. That booklet was given to every employee.

Q. And when were the rules first posted?—A. They had been posted at various times prior to that and have been posted at various times down there during the years since the plant has been there.

Q. I mean when was the rules, or compilation of the rules?—A. A sheet containing a list of the rules has been posted on the bulletin boards.

Q. When?—A. It may be on the bulletin board a month, and then taken off for a few months, and then a new list put back on.

Q. When this booklet was published, this Respondent's Exhibit 1, weren't the rules as set forth in there correct?—A. At the time of printing; yes.

Q. And when was it printed?—A. October 1941.

* * *

Q. When was the word "distributing" added to that rule about posting literature?—A. Prior to May 15, 1943, at least, and probably quite some time prior to that.

126 Q. A month, you mean, prior to that?—A. That is the date I am placing on it. That is as far as I would swear to, without checking it.

* * *

JIMMIE HAYNES (Respondent's witness recalled).

* * *

Direct examination by Mr. WHEELER:

Q. Mr. Haynes, I show you a document marked for identification as Respondent's Exhibit No. 10, under date of October 11, 1940. Were you employed by LeTourneau Company at that time?—A. Yes, sir.

Q. Do you know whether or not that is a copy of the rules and regulations that was then in force?—A. Insofar as of that date; yes.

Q. Were those rules posted on the bulletin boards in general?—A. I would not say that they were posted on every bulletin board. They were given to all supervisors, and it was the supervisors' duties to know that all employees knew the correct rules and regulations as any changes were made.

Q. In other words, the supervisors were charged with the duty of conveying to the employees the rules and regulations under which they were working?—A. That is a joint responsibility of the industrial relations department and the supervisors.

* * *

127 *Board Exhibit 2*

Violation of the following rules will be cause for immediate discharge

1. Misrepresentation of facts in obtaining employment.
2. Failure to report for duty, without bona fide reasons or repeated tardiness.
3. Disorderly or immoral conduct.
4. Bringing intoxicants into or consuming intoxicants in the plant or reporting for duty under the influence of liquor.
5. Smoking in prohibited areas such as the Painting Dept., Oil Houses, or Oxygen Dept.
6. Endangering employees through violation of established safety rules.
7. Contracting Venereal Diseases.
8. Sleeping on duty or neglect of duty.
9. Incompetence, Negligence, or Insubordination.
10. Deliberate destruction or removal of the "Company's" property or another employee's property.
11. Dishonesty or the reporting of production falsely.
12. Avoidable waste of materials or defective workmanship.
13. Causing a disturbance on "Company" property.
14. Refusal to follow an orderly procedure in the adjustment of grievances.
15. The use of insulting or abusive language on the part of any employee toward another employee.
16. The spreading of false reports detrimental to harmonious relations between employees and the "Company."
17. Advocating, or being a member of, or affiliating with, any organization which advocates overthrow of the American Social Order and the American form of Government.
18. Advocating or participating in unlawful seizure and or trespass of the "Company's" property.

19. Physical condition, as determined by the "Company" Doctor, making it unsafe for the employees to continue employment.

128 20. Failure of any employee within two weeks after notification that his or her work is not up to standard to attain the average efficiency of the department in which the worker is employed.

21. Any activities not related to the employees' job during working hours.

22. Failure to have attachment or assignment of wages released within four weeks of filing or repeated attachments or assignments.

23. The restriction of output.

24. The posting of handbills, placards, posters, or advertising matter about the plant without permission of the Plant Manager.

25. Running, yelling, scuffling, fooling, playing practical jokes, or throwing articles at each other.

26. Washing up or preparing to quit before the whistle blows.

27. Punching another employee's time card or changing or altering any time card.

28. Operating any machine or vehicle without being authorized to operate same.

29. Removing foreign particles from the eyes of fellow employees without being authorized to do so.

129 *Board Exhibit 4*

.....All LeTourneau employees are invited to attend charter unveiling of your local union, United Steelworkers of America, C. I. O., Saturday, July 17th, 7:30 p. m., Masonic Bldg., Sage and Railroad Sts., Toccoa, Ga.

Also hear and see Government records of the R. G. LeTourneau Company of Peoria, Ill., forcing their employees to join a company-dominated union or lose their jobs.

LeTourneau believes in unions that he can control.

Join one that you will control.

Attend this meet. Hear and see the facts.

130 *Excerpts from respondent's Exhibit 1*

* * *

"Off the Path"

For the best interests of all involved, certain rules and regulations are necessary in any group. Here at LeTourneau's for

your good and that of your fellow employees commission of any of these infractions will be cause for immediate dismissal:

1. Misrepresentation of facts in obtaining employment.
2. Dishonesty or false reporting of production.
3. Any activities during working hours not related to your job.
4. Washing up or preparing to leave before the whistle blows.
5. Punching another employee's time card, or changing or altering any time card.
6. Deliberate destruction or removal of Company property or another employee's property, or any attempt to injure, interfere with, or obstruct our production.
7. Causing a disturbance on Company property.
8. The spreading of false reports detrimental to harmonious relations between employees and Company.
9. Advocating, or being a member of, or affiliating with, any organization which advocates overthrow of the American social order and form of government.
10. Advocating or participating in unlawful seizure and of trespass of the Company property.
11. The restriction of output.
12. Failure to report for duty without bona fide reasons, or repeated tardiness.
13. Disorderly or immoral conduct.
14. Smoking in prohibited areas such as the Painting Dept., Oil Houses, Oxygen Dept., Printing Dept., etc.
15. Sleeping on duty or neglect of duty.
16. Incompetence, negligence, or insubordination.

131 17. Deliberate waste of materials or intentionally defective workmanship.

18. Refusal to follow an orderly procedure in the adjustment of grievances.
19. The use of insulting or abusive language on the part of any employee toward another employee.
20. Failure of any employee within two weeks after notification that his or her work is not up to standard to attain the average efficiency of the department in which employed.
21. Repeated attachments or assignments of wages, or failure to have attachment or assignment of wages released within four weeks of filing.
22. The posting of handbills, placards, posters, or advertising matter on Company property without the permission of the Personnel Manager.
23. Running, yelling, scuffling, playing practical jokes, or throwing articles at each other.
24. Operating any machine or vehicle without permission.

25. Bringing intoxicants into or consuming intoxicants in the plant, or reporting for work under the influence of liquor.

26. Endangering employees through violation of established safety rules.

27. Physical condition, as determined by the Company doctor, making work unsafe for employees, including the contracting of venereal diseases.

28. Removing foreign particles from the eyes of fellow employees without being authorized to do so.

* * *

132 *Respondent's Exhibit 3*

JULY 3, 1941.

Special Order (Unnumbered).
To: All Guards and Guides.
Subject: Distributing literature on Co. Property.

1. In order that the maximum amount of safety be given to the property of our employees while on the property of LeTourneau Company of Georgia, the below-named rule will be effective this date.

2. In the future no Merchant, Concern, Company, or Individual or Individuals will be permitted to distribute, post, or otherwise circulate handbills or posters, or any literature of any description, on Company property without first securing permission from the Personnel Department.

(Signed) GEORGE M. STORES,
Capt. of the Guard.

123 In United States Circuit Court of Appeals for the Fifth Circuit

No. 10954

LETOURNEAU COMPANY OF GEORGIA

vs.

NATIONAL LABOR RELATIONS BOARD

Argument and submission

May 29th, 1944

On this day this cause was called, and, after argument by A. C. Wheeler, Esq., for petitioner, and Harold A. Cranefield, Esq., Regional Attorney, National Labor Relations Board, for respondent, was submitted to the Court.

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 10954

LE TOURNEAU COMPANY OF GEORGIA, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board, Sitting at Washington, D. C.

Before SIBLEY, HOLMES, and McCORD, Circuit Judges

Opinion

June 23, 1944

SIBLEY, Circuit Judge: The petitioner seeks to set aside an order of the National Labor Relations Board which required the petitioner to cease and desist from discouraging membership of its employees in United States Steel Workers of America, or discriminating in regard to their hire and tenure of employment, or in any manner interfering with, restraining, or coercing employees in their right to self organization; and to rescind a rule of petitioner against distributing literature insofar as it prohibits distribution of union literature by employees outside the gates of the plant and in the parking lots; and to make whole employees Ferguson and Ayers for two days suspension for violation of the rule; and to post appropriate notices.

134 There is no question of fact, and only one question of law, to wit: Whether the impartial enforcement of the rule, made long before union activities began, is, as to union literature, a violation of the National Labor Relations Act. The complaint asserted the suspension of the two employees was discriminatory and because of union activity, but the Board found otherwise on that point.

The main facts are that petitioner is a large manufacturer of earth-moving machinery, employing 2,100 employees who come to their work in automobiles and busses to a main entrance gate of the enclosed plant near the highway. Between the enclosure and the highway the petitioner graded and surfaced a parking lot and a smaller similar lot just across the highway, both lots being on its lands. In 1941 thefts of articles from the parked cars began;

thought to be due to a practice of placing advertising matter in them. The lots were also littered up thereby. Petitioner thereupon put the parking lots under military guards, who also kept them clean, and were available to protect the plant, which was engaged in work important to the war effort, in case of emergency. On July 3, 1941, the captain of the guard, presumably with petitioner's authority, and consistently with the general policy of petitioner manifested by notices posted in the plant, and in a book of rules given employees, issued a rule that "No merchant, concern, company, or individual will be permitted to distribute, post, or otherwise circulate handbills, posters, or any literature of any description on company property without securing permission from the personnel department." The Board finds that "Since July 3, 1941, the plant protection force has strictly enforced the no-distributing-no-posting rule on the respondent's premises, including the two parking lots."

In February 1943, the Congress of Industrial Organizations attempted to organize the employees. Petitioner posted an appropriate notice that the joining or not joining of the union was the employee's right, with which petitioner would not interfere or permit others to interfere, and any contrary rumor was untrue. On the day of the election, which the C. I. O. lost, Ferguson handed out some C. I. O. handbills on the larger parking lot after work hours, without permission of the personnel department. He was stopped by the guard and on the next day suspended for two days for violation of the rule. A few months later the United Steel Workers of America undertook further to organize the employees. Ayers asked permission of the personnel department to distribute literature and was refused. Supposing that the smaller lot across the highway was not Company premises, he distributed it there. The guard stopped him and in due course he was suspended for two days also. As has been stated, the Board has found the suspensions were not for union activity but in the impartial enforcement of the rule.

135 The Board, recognizing the rule as valid within the enclosure, thought it an unreasonable interference with the employees' right to organize, and so an unfair labor practice, when applied to employees not on duty and outside the enclosure on the parking lots. These Company rules, as posted and as written in the employees' handbooks, had no special reference to union organization and were made before any was attempted. But their broad terms included union or anti-union literature as well as any other. Under the National Labor Relations Act it is well settled that the employer cannot "interfere" with any effort of the em-

ployees to organize, either to encourage or prevent it. He cannot facilitate the organization even by providing a meeting place without incurring the charge that he is attempting to dominate it. He can prohibit organization efforts taking place during work time and within the plant, as the Board concedes. The reasons for this are well stated in Midland Steel Products Co. vs. National Labor Relations Board, 113 Fed. (2) 800. The rule there upheld was quite similar to the rule before us, prohibiting solicitation on Company property, unless approved by the management. Unfortunately organization efforts often produce excitement and feeling among the employees, even exhibitions of violence. Since the employer properly has no part or interest in such efforts, he is not required by the law to furnish a theater for them. It may be wisest and best for all concerned that the employees discuss and act on the matter of their own organization elsewhere than on the employer's property. We think he may so insist, and therefore may enforce as against would-be organizers such a rule as we have here, if not designed to impede organization and not discriminatorily applied.[1] Finding no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts on his premises, we cannot hold this rule unlawful as applied to these parking lots. They were not only owned by petitioner, but were improved as a necessary part of the plant and adjoined it. Though not enclosed by the fence, they were guarded and serviced just as the area within was. The rule, it may be noted, did not bar Ferguson and Ayer from speaking to fellow employees about organizing, or making appointments for meetings elsewhere, or even on the parking lots. It by no means stopped all organizational activity, but only the distribution of literature on Company property. The suspensions, as penalties for its breach, not having been done discriminatorily because of the union activity involved, do not constitute unfair labor practices. The Board's order, we conclude, is not according to law and must be set aside.

136 Petition sustained.

[1] The case of National Labor Relations Board vs. Cities Service Oil Co., 122 Fed. (2) 149, involved seamen on duty on a ship in port for a day only, and was exceptional as the court explains. Organization was not in progress but was complete, and the right to present grievances was the right interfered with.

In United States Circuit Court of Appeals for the Fifth Circuit

No. 10954

LeTOURNEAU COMPANY OF GEORGIA

vs.

NATIONAL LABOR RELATIONS BOARD

Judgment

June 23, 1944

This cause came on to be heard on the petition of LeTourneau Company of Georgia for review of the order of the National Labor Relations Board entered on February 12, 1944, "In the Matter of LeTourneau Company of Georgia, and United Steelworkers of America, CIO," Case No. 10-C-1342, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the petition to set aside the order of the National Labor Relations Board be, and the same is hereby, sustained; and that the said order of the National Labor Relations Board be, and it is hereby, set aside.

Clerk's certificate to foregoing transcript omitted in printing.

137 In the Supreme Court of the United States

October Term, 1944

No. 452

Order allowing certiorari.

November 6, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case transferred to the summary docket and assigned for argument immediately following No. 226 which is also transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1944

No. 452

In the Supreme Court of the United States

OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LE TOURNEAU COMPANY OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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807680—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LE TOURNEAU COMPANY OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered on June 23, 1944 (R. 82),[1] setting aside the Board's order directed against the Le Tourneau Company of Georgia.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 79–82) is reported in 143 F. (2d) 67. The findings of fact, conclusions of law, and order of

[1] "R" denotes references to the "Transcript of Record," and "B. A." references to the Board's appendix.

the Board (R. 55–73) are reported in 54 N. L. R. B. 1253.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 23, 1944 (R. 82). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

The Company promulgated a rule prohibiting the distribution of printed matter on its property. Employees Ferguson and Ayers violated this rule by passing out union handbills on the Company's parking lots, and each was suspended from work for 2 days for the infraction. The plant is in a rural area, distant from any city, on a 6,000-acre tract of land owned by the Company or its subsidiary. Most of the employees live at great distances from it, and their homes are scattered over a large area. The employees' entrance to the plant is set back 100 feet from a public highway and there is a parking lot on the Company's property between the plant entrance and the highway. More than 60 percent of the employees never have occasion to set foot on the highway in going to or coming from work because the vehicles in which they travel are parked on this lot. The questions are whether, in the circumstances of this case, the

Board could properly find (a) that the Company by promulgating and enforcing the aforesaid rule, insofar as it prohibited employees from distributing union handbills on its parking lots, interfered with the exercise of the rights guaranteed employees under Section 7 of the Act, in violation of Section 8 (1); and (b) that the Company violated Section 8 (3) and (1) of the Act by suspending Ferguson and Ayers.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are set out in the Appendix, pp. 17–18, *infra*.

STATEMENT

Upon the usual proceedings the Board, on February 12, 1944, issued its findings of fact, conclusions of law and order (R. 55–73). The pertinent facts, as found by the Board and as shown by undisputed evidence, may be summarized as follows:[2]

Le Tourneau Company of Georgia, a Georgia corporation, hereinafter called the Company, is a manufacturer of earth-moving machinery and other products, and employs more than 2,100 persons at its plant, near Toccoa, Georgia (R. 57–58;

[2] In the following statement references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

24, B. A. 3). The plant site is part of a 6,000-acre tract of land, owned by the Company or its subsidiary (R. 58; B. A. 3), and extends in its entirety along the northerly side of U. S. Highway 13 (R. 58; B. A. 3–4, 6).[3] It is divided into 2 sections by a roadway that intersects the highway (R. 58; B. A. 7). A 6-foot wire fence, roughly paralleling the highway, but set back at distances varying from 30 to 100 feet from the highway (R. 59; B. A. 4, 6), encloses each section of the plant (R. 59; B. A. 4, 5). Virtually all of the employees, irrespective of on which side of the roadway they work, enter and leave the plant through a main gate which adjoins an office building that serves as a section of the fence (R. 59; B. A. 4, 5, 6, 7, 33).[4] This gate is set back from the highway 100 feet (R. 59, 66; B. A. 5, 29); the company-owned ground between the office building and the highway (R. 59; B. A. 29) is paved with concrete (R. 59; 66–67; B. A. 5, 7). This concrete apron and a connecting gravel plot, together called the North parking lot, extend along the highway for 250 feet (R. 59; B. A. 4–5, 6–7; Tr. 108).[5] On the opposite side of the highway is another parking lot, here-

[3] Adjacent to the plant, but on the southerly side of Highway 13, is a hamlet owned by the Company, known as Tournapull, consisting of a United States Post Office, a gasoline station, and about 50 houses, which are occupied by employees of the Company (R. 58; B. A. 3–4). Toccoa is about 3 miles distant from Tournapull (B. A. 3).

[4] The time clocks are inside the gate (R. 59, n. 3; B. A. 7).

inafter called the South parking lot, which is leased by the Company (R. 59; B. A. 5, 8–9, 23, 26–27, 29). Both lots are guarded and kept clean by the Company's plant-protection force (R. 59; B. A. 8, 26–27, 28, 36).

Most of the employees live in widely scattered communities and on farms within a radius of 20 miles of the plant (R. 58, 67; B. A. 4). They travel to and from work by automobile or bus (R. 59, 67; B. A. 5, 8–9, 11, 27, 28–29, 30). The conveyances in which about 60 percent of them travel are parked on the North lot; most of the others are parked on the South lot (R. 59; B. A. 8–9, 11).

Since July 1941, the Company has strictly enforced a rule prohibiting all persons from distributing printed matter of any kind on its property without permission (R. 61; B. A. 27–28, 48, 34–36, 37–38).[5] In February 1943, the Congress of Industrial Organizations, hereinafter called the C. I. O., began to organize the Company's employees, and on April 8, 1943, the Board held an election at the plant, which the C. I. O. lost (R. 61; B. A. 12–13, Tr. 37). On the day of the Board election, employee Grady Ferguson, after completing his day's work, boarded a bus standing on the North parking lot (R. 62; B. A. 25, 12–13).

[5] Before the rule was promulgated, merchants from nearby towns employed boys to place advertisements in the parked automobiles, a practice that had resulted in littering (R. 60; B. A. 34–35). Thefts from the automobiles had also occurred from time to time before the rule was adopted (*id.*).

On entering the bus, Ferguson found a few C. I. O. leaflets, some of which he gave to fellow passengers, and others of which he handed through an open window to persons on the parking lot (R. 62; B. A. 25). The Captain of the Plant Guard saw the incident, and instructed Ferguson to report to the plant manager the next day (R. 62; B. A. 25–26); the Plant Manager suspended Ferguson from work for 2 days because of his violation of the "no-distribution" rule (R. 62; B. A. 26).

After the defeat of the C. I. O., the Union undertook to organize the Company's employees (R. 61; B. A. 12–13). On July 15, 1943, employee L. Wayman Ayers, president of the local union, asked for permission to distribute handbills in and about the plant announcing a Union meeting, but the Plant Manager denied his request (R. 62; B. A. 13–14). The next day, Ayers distributed a few union handbills on the South parking lot during his lunch hour, in the mistaken belief that this lot did not belong to the Company (R. 62–63; B. A. 13–16, 21, 39–40). A plant guard observed his actions, which were ultimately reported to the General Manager. The latter suspended Ayers for 2 days because of his violation of the "no-distribution" rule (R. 63; B. A. 13, 16–18, 24, 39–40).

United Steelworkers of America, affiliated with the C. I. O., the labor organization that filed the charges in this proceeding (R. 55; 14–15).

Upon the foregoing facts the Board concluded that although the "no-distribution" rule had "been applied to all persons, without exception, seeking to distribute literature on the parking lots" (R. 64), the Company, "in applying its 'no-distributing' rule to the distribution of union literature by its employees on its parking lots * * * placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization, * * *" (R. 68). The Board pointed out:

> * * * respondent's plant is located in the country in the heart of 6,000 acres of land owned by it or its subsidiary. Apart from U. S. Highway No. 13 (and perhaps the intersecting road), the respondent and its subsidiary own all the land adjacent to the plant. This, in itself, seriously limits the possibilities of effectively communicating with the bulk of the respondent's employees. This limitation would not, however, be too restrictive if the respondent's gate opened directly onto the highway, for then persons could stand outside the respondent's premises and distribute literature as each employee entered or left the plant. But at the respondent's plant the

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Cf. *Matter of Adolph Spalek* and *William J. Zrenchik*, copartners, doing business as *Spalek Engineering Company*, 45 N. L. R. B. 1272.

> gate is 100 feet back from the highway, on company property. Over 60 percent of the respondent's employees, after passing the gate, enter automobiles or busses parked in the space between the gate and the highway [i. e. the North parking lot], and presumably speed homeward, without ever setting foot on the highway. Distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is consequently seriously impeded (R. 66–67).

After thus emphasizing the serious detrimental impact of the rule upon the employees' freedom of self-organization, the Board turned to a consideration of the possible detriment to the employer's interests which would flow from abrogation of the rule as applied to the parking lots. The Board recognized that the Company had a legitimate interest in preventing littering, but found that that interest did not justify the rule under "the peculiar facts of this case" (R. 67). The Board noted that littering on a parking lot is not as serious to an employer as would be littering within buildings where production is being car-

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The impediment was particularly serious in the instant case, as the Board stated (R. 67), because "the employees' homes are scattered over a wide area"; hence, "In the absence of a list of names and addresses, * * * direct contact with a majority of the respondent's employees away from the plant would be extremely difficult" (R. 67).

ried on * * *" (R. 67), and that the Company had no general rule against littering (R. 67; B. A. 31). In balancing this employer interest against the employees' right to solicit membership for their labor organization and to enjoy their right to communicate with one another for the purpose of self-organization, the Board, emphasizing that this case presents a situation in which the employees could not as a practical matter distribute union handbills at the plant gates, found that the public interest in affording the employees a practical opportunity to enjoy their rights under the Act outweighed the employer's interest in preventing littering on its parking lots (R. 67). In answer to the contention that the rule was designed to prevent thefts, the Board found (R. 68) that thefts had ceased when outsiders were denied access to the lots and that in any event the rule could have no bearing upon that problem because under the rule the employees continued to have free access to the lots (R. 67-68). In answer to the Company's final contention—namely, that the rule lessened the likelihood of employees bringing literature into the plant itself—the Board pointed out that the Company has no rule against employees carrying newspapers or other printed matter into the plant; and that it places copies of a magazine in boxes near the plant gate which the employees can take with them into the plant (R. 68; B. A. 9-10, 30).

The Board therefore concluded that the Company, by applying its no-distribution rule to the distribution of union literature by its employees on its parking lots, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 71) and by suspending Ferguson and Ayers for violations of the rule, discriminated in regard to their hire and tenure of employment in violation of Section 8 (3) of the Act (R. 68, 71).

The Board ordered the Company to cease and desist from its unfair labor practices; to make Ferguson and Ayers whole for the wages they lost during their respective two-day suspensions; to rescind the rule insofar as it prohibits distribution of union literature by employees in the parking lots; and to post appropriate notices (R. 72–73). On February 24, 1944, the Company petitioned the court below to set aside the Board's order (R. 8, 1–7). Thereafter the Board, answering the Company's petition, requested that its order be enforced (R. 9–13). On June 23, 1944, the court below handed down its opinion and entered a decree setting aside the Board's order in its entirety (R. 82).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding, as a matter of law, that the Company's application of its "no distribution" rule to prevent the distribution of union literature by employees on parking lots did not interfere with

its employees' exercise of the rights guaranteed them in Section 7 of the Act.

2. In holding without qualification that there is "no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts [by his employees] on his premises" (R. 81), and that an employer may therefore insist "that the employees discuss and act on the matter of their own organization elsewhere than on the employer's property" (R. 81).

3. In holding that the issue presents a question of law for the court to decide for itself and in failing to give any weight to the Board's determination that in the instant circumstances, the application of the rule to employee conduct on the parking lots constituted interference in violation of Section 8 (1) of the Act.

4. In holding that the suspension of Ferguson and Ayers for having violated the rule did not constitute discrimination respecting hire and tenure of employment violative of Section 8 (3) of the Act.

5. In setting aside and denying enforcement to the Board's order.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with *Republic Aviation Corporation* v. *National Labor Relations Board*, 142 F. (2d) 193 (C. C. A. 2), certiorari pending, No. 226, this Term, in which the Board

has filed a memorandum consenting to the granting of a writ of certiorari. The fundamental issue in both the *Republic* and the instant case is whether, and to what extent, an employer may prohibit his employees from engaging in union activity on company property outside of working time. In the *Republic* case, an employee who solicited membership for his union in the plant during the lunch hour was discharged for violating a rule prohibiting solicitation of any kind in the plant (51 N. L. R. B. 1186, 1187, 1195–1196). If, as the Second Circuit held, the Board may order an employer not to prohibit union solicitation within the plant outside of working hours, it would seem to follow that it could make a similar order with respect to a rule governing the distribution of literature in a parking lot, which would cause, if anything, less interference with the employer's business.

The same considerations impelled the Board in both cases to find that the employers' application of their respective rules was in derogation of rights guaranteed employees by Section 7 of the Act. In broad outline, these considerations are that the application of the plant rules in the special circumstances under which the employees in both cases worked and lived resulted in a virtual denial to them of the rights guaranteed by the statute, and that the detriment which the employers would have suffered from abrogation

of the rules was not sufficiently serious to warrant denial of the employees' rights.

In the *Republic* case the Circuit Court of Appeals for the Second Circuit upheld the Board's position, saying that the Board could properly weigh "what in fact will be the prejudice to the interests of the employer in allowing electioneering to go on during lunch hours, and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it" (142 F. (2d) at 196). It held further that the Board is empowered in the first instance to determine "whether the benefit [to the employer] shall prevail over the prejudice [to the employees] or vice versa" (*id.* at 196), and that "only in cases where [the reviewing courts] believe that there is no reasonable warrant for the priority actually awarded" (*id.* at 196), may the courts set aside the Board's determination. In contrast to this ruling, the court below held that an employer need not furnish "a theater" for his employees' efforts at self-organization; that he may lawfully insist "that the employees discuss and act on the matter of their own organization elsewhere than on the employer's property" because, said the court, "there is no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts on his premises" (R. 81). Thus, the court below excluded as irrelevant the competing considerations that the Board and the Circuit Court of

Appeals for the Second Circuit deem controlling, and held that plant rules forbidding union activity on company property are lawful however destructive their impact upon employee rights of self-organization unless the rules are adopted or applied for the purpose of discouraging union membership (R. 81).[9]

2. The questions presented in the instant case, as in the *Republic* case, are of importance in the administration of the National Labor Relations Act. In both cases, the Board findings reveal (compare pp. 5, 7–8, *supra* with 51 N. L. R. B. 1186, 1195–1196), that the employees live over a widely scattered area at great distances from the plant; in both the plants are situated in a region remote from any city. In such circumstances, as the Board has found (*id.*), the plant is the normal—indeed the only—place at which the employees

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[9] The Circuit Court of Appeals for the Sixth Circuit held such a rule valid in a case where the Board had not passed on the rule. *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800, 805, 806. The Circuit Court of Appeals for the Tenth Circuit has twice, by way of dictum, expressed its view that such a rule is valid unless it was adopted "merely as a device to obstruct or impede self-organization," once in a case where it upheld the Board's finding that the rule was adopted merely for anti-union purposes (*National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. (2d) 410, 411), and the second time in a case in which it set aside a finding that employees were discriminated against because of union activities and held that they were properly punished for violating a valid no-solicitation rule. *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 423, 435.

can, as a practical matter, exercise their right to self-organization. Only at the plant, where they all congregate, can they adequately communicate with one another; insurmountable practical barriers stand in the way of any attempt by such employees to reach any large number of their fellow workers at home. If in such plants the Board were powerless to protect the employees in carrying on union solicitation in or adjacent to the plant on their own time, the aim of the statute could not be achieved by employees in a large segment of American industry. Nor should it be overlooked that the rationale of the court below sanctions prohibitions of all kinds of union solicitation on the employer's premises, even though the solicitation is confined entirely to nonworking time.

The problem which this case poses has been of great concern to the Board. In its Eighth Annual Report, the Board stated that the problem "appeared and reappeared" and was "of general interest," and that it "felt it wise to evolve a clear and general policy for the guidance of employers and labor organizations alike."[10] The policy that the Board adopted, which was followed in the *Republic* and in the present case, is the policy of balancing the competing considerations previously mentioned (pp. 12–14 *supra*).

[10] National Labor Relations Board, *Eighth Annual Report* (Gov't Print. Off., 1944), p. 29.

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision conflicts with that of another Circuit Court of Appeals. It is respectfully submitted that this petition for a writ of certiorari be granted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 1.

* * * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or

condition of employment to encourage or discourage membership in any labor organization * * *

* * * * * * *

SEC. 10.

* * * * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 452

In the Supreme Court of the United States

OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LE TOURNEAU COMPANY OF GEORGIA

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 91–93) is reported in 143 F. (2d) 67. The findings of fact, conclusions of law, and order of the Board (R. 33–46) are reported in 54 N. L. R. B. 1253.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on June 23, 1944 (R. 94). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, when no other feasible means of distributing union literature is available, the Board could properly find that the Company by promulgating and enforcing a rule prohibiting the distribution of printed matter on its property, in so far as it prohibited employees from distributing union handbills on its parking lots, interfered with the exercise of the rights guaranteed employees under Section 7 of the Act, in violation of Section 8 (1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151 *et seq.*) are set out in the Appendix, pp. 46–47, *infra*.

STATEMENT

Upon the usual proceedings the Board, on February 12, 1944, issued its findings of fact, conclusions of law and order (R. 33–46). The pertinent facts, as found by the Board and as shown by undisputed evidence, may be summarized as follows:[1]

Le Tourneau Company of Georgia, a Georgia corporation, hereinafter called the Company, is a manufacturer of earth-moving machinery and

[1] In the following statement references preceding a semicolon are to the Board's findings, those following are to the supporting evidence. References to the typewritten transcript of testimony are indicated by the symbol "Tr."

other products, and employs more than 2,100 persons at its plant, near Toccoa, Georgia (R. 35–36; 14–15, 54). The plant site is part of a 6,000-acre tract of land, owned by the Company or its subsidiary (R. 36; 54), and extends in its entirety along the northerly side of U. S. Highway 13 (R. 36; 54–55, 56–57, Tr. 13).[2] It is divided into 2 sections by a roadway that intersects the highway (R. 36; 56–57). A 6-foot wire fence, roughly paralleling the highway, but set back at distances varying from 30 to 100 feet from the highway (R. 36; 55, 56), encloses each section of the plant (R. 36; 55, 56). Virtually all of the employees, irrespective of the side of the roadway upon which they work, enter and leave the plant through a main gate which adjoins an office building that serves as a section of the fence (R. 36; 55, 56, 57, 58, 79).[3] This gate is set back from the highway 100 feet (R. 36, 42; 56); the company-owned ground between the office building and the highway (R. 36; 76), is paved with concrete (R. 36; 56–57). This concrete apron and a connecting gravel plot, together called the North parking lot, extend along the highway for 150 feet (R. 36;

[2] Adjacent to the plant, but on the southerly side of Highway 13, is a hamlet owned by the Company, known as Tournapull, consisting of a United States Post Office, a gasoline station, and about 50 houses, which are occupied by employees of the Company (R. 36; 54–55). Toccoa is about 3 miles distant from Tournapull (R. 36; 54).

[3] The time clocks are inside the gate (R. 36, n. 3; 58).

55–56, 57, Tr. 108). On the opposite side of the highway is another parking lot, hereinafter called the South parking lot, which is leased by the Company (R. 37; 55, 58–59, 71, 74, 75–76, Tr. 106–108). Both lots are guarded and kept clean by the Company's plant-protection force (R. 37; 58, 74, 75, 81–82).

Most of the employees live in widely scattered communities and on farms within a radius of 20 miles of the plant (R. 36, 42; 55, Tr. 78). They travel to and from work by automobile or bus (R. 36–37, 42; 55, 56, 58, 59, 60–61, 77). The conveyances in which about 60 percent of them travel are parked on the North lot; most of the others are parked on the South lot (R. 36–37; 58–59, 60–61).

Since July 1941, the Company has strictly enforced a rule prohibiting all persons from distributing printed matter of any kind on its property without permission (R. 37–38; 74–75, 80–82, 83, 90).[4] In February 1943, the Congress of Industrial Organizations, hereinafter called the C. I. O., began to organize the Company's employees, and on April 8, 1943, the Board held an election at the plant, which the C. I. O. lost (R.

[4] Before the rule was promulgated, merchants from nearby towns employed boys to place advertisements in the parked automobiles, a practice that had resulted in littering (R. 37; 80–81, 76). Thefts from the automobiles had also occurred from time to time before the rule was adopted (R. 37; 80–81, 79).

38; 61–62, Tr. 38–39). On the day of the Board election, employee Grady Ferguson, after completing his day's work, boarded a bus standing on the North parking lot (R. 38; 72–73, Tr. 82). On entering the bus, Ferguson found a few C. I. O. leaflets, some of which he gave to fellow passengers, and others of which he handed through an open window to persons on the parking lot (R. 38; 72–73). The Captain of the Plant Guard saw the incident, and instructed Ferguson to report to the plant manager the next day (R. 38; 73); the Plant Manager suspended Ferguson from work for 2 days because of his violation of the "no-distribution" rule (R. 38–39; 73).

After the defeat of the C. I. O., the Union undertook to organize the Company's employees (R. 38; 62–63). On July 15, 1943, employee L. Wayman Ayers, president of the local union, asked for permission to distribute handbills in and about the plant announcing a Union meeting, but the Plant Manager denied his request (R. 39; 63–64). The next day, Ayers distributed a few union handbills on the South parking lot during his lunch hour, in the mistaken belief that this lot did not belong to the Company (R. 39; 63–65, 68–69, 70, 84–85, Tr. 44, 72–73). A plant guard observed his actions, which were ultimately

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[5] United Steelworkers of America, affiliated with the C. I. O., the labor organization that filed the charges in this proceeding (R. 34; 8–9).

reported to the General Manager (R. 39; 84–85, 65, 66). The latter suspended Ayers for 2 days because of his violation of the "no-distribution" rule (R. 39; 63, 65–66, 14–15).

Upon the foregoing facts the Board concluded that although the "no-distribution" rule had "been applied to all persons, without exception, seeking to distribute literature on the parking lots" (R. 40), the Company, "in applying its 'no-distributing' rule to the distribution of union literature by its employees on its parking lots * * * placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees' right to self-organization, * * *" (R. 43).[2]

The Board pointed out that because of the circumstances under which the employees worked and lived, and the location and surroundings of the Company's plant, distribution of union literature to employees at places other than the Company's property was virtually impossible (R. 41–42; compare, R. 66–67). After emphasizing the serious detrimental impact of the rule upon the employees' freedom of self-organization, the Board turned to a consideration of the possible detriment to the employer's interests which would flow from

[2] The Board found that the rule had not been discriminatorily enforced against Ferguson and Ayers for the purpose of discouraging union membership and activity (R. 39–40).

abrogation of the rule as applied to the parking lots. The Board recognized that the Company had a legitimate interest in preventing littering, but found that under the facts of this case that interest did not justify the rule (R. 40, 42). The Board noted that littering on a parking lot is not as serious to an employer as would be littering "within buildings where production is being carried on * * *" (R. 42; 78, 71–72), and that the Company had no general rule against littering (R. 42; 78–79, Tr. 121–122). In answer to the contention that the rule was designed to prevent thefts, the Board found (R. 42–43; 79, Tr. of oral argument before the Board, 33) that thefts had ceased when outsiders were denied access to the lots and that in any event the rule could have no bearing upon that problem because under the rule the employees continued to have free access to the lots (R. 42–43). In answer to the Company's final contention—namely, that the rule lessened the likelihood of employees bringing literature into the plant itself—the Board pointed out that the Company has no rule against employees carrying newspapers or other printed matter into the plant, and that it places copies of a magazine in boxes near the plant gate, which the employees can take with them into the plant (R. 43; 59–60, 77).

The Board concluded that since the rule, as applied to the distribution of union literature on the

parking lots, was not necessary to protect any legitimate employer interest, and its enforcement deprived employees of the only practical opportunity to enjoy their rights under the Act the rule was inconsistent with the statutory policy (R. 40–43). The Board further concluded that the Company, by applying its no-distribution rule to the distribution of union literature by its employees on its parking lots, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 71) and by suspending Ferguson and Ayers for violations of the rule, discriminated in regard to their hire and tenure of employment in violation of Section 8 (3) of the Act (R. 43, 45).

The Board ordered the Company to cease and desist from its unfair labor practices; to make Ferguson and Ayers whole for the wages they lost during their respective two-day suspensions; to rescind the rule insofar as it prohibits distribution of union literature by employees in the parking lots; and to post appropriate notices (R. 45–46). On February 24, 1944, the Company petitioned the court below to set aside the Board's order (R. 1–5). Thereafter the Board, answering the Company's petition, requested that its order be enforced (R. 5–8). On June 23, 1944, the court below handed down its opinion and entered a decree setting aside the Board's order in its entirety (R. 91–94).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding, as a matter of law, that the Company's application of its "no distribution" rule to prevent the distribution of union literature by employees on parking lots did not interfere with its employees' exercise of the rights guaranteed them in Section 7 of the Act.

2. In holding without qualification that there is "no provision, express or implied, in the National Labor Relations Act which requires an employer to permit organization efforts [by his employees] on his premises" (R. 93), and that an employer may therefore insist "that the employees discuss and act on the matter of their own organization elsewhere than on the employer's property" (*id.*).

3. In holding that the issue presents a question of law for the court to decide for itself and in failing to give any weight to the Board's determination that in the instant circumstances, the application of the rule to employee conduct on the parking lots constituted interference in violation of Section 8 (1) of the Act.

4. In holding that the suspension of Ferguson and Ayers for having violated the rule did not constitute discrimination respecting hire and tenure of employment violative of Section 8 (3) of the Act.

5. In setting aside and denying enforcement to the Board's order.

SUMMARY OF ARGUMENT

The suspension from employment of Ferguson and Ayers as a penalty for distributing union handbills was violative of Section 8 (3) and (1) of the Act unless the Company was privileged to prohibit its employees from engaging in such activities. The Board found that the Company's rule prohibiting the distribution of union literature on its parking lots was itself violative of Section 8 (1) of the Act and that the rule consequently could not justify the suspensions. Although a literal reading of Section 8 (1) would seem to render illegal all plant rules which tended to interfere with union activities protected in Section 7, the Board, in construing the statute, has sought to harmonize the employee interests which the statute protects with competing proprietary interests of employers. The Board recognizes that employees must have available adequate channels of communication for the receipt and transmittal of organizational information both oral and written in order that they may exercise the rights guaranteed them under the Act. It recognizes on the other hand that solicitation of union members or distribution of union literature on plant premises is sometimes injurious to legitimate employer interests. Therefore, where an employer seeks to justify a rule prohibiting self-organizational activities on his premises, the Board balances the extent of the injury which the employer would sustain if the rule were abrogated

against the extent of the injury to the organizational interests of the employees which the rule imposes, and in its decision seeks to protect to as great a degree as possible the legitimate interests of both.

The Board has held that an employer is justified in prohibiting union solicitation during working hours. And where other adequate methods of distributing union literature to employees are available, the Board has held that an employer's interest in maintaining plant cleanliness justifies a rule prohibiting the distribution of union literature within the plant. Where no other adequate channels of distribution are available, however, the Board must decide whether the injury to the employer's legitimate interests is sufficiently serious to justify frustration of the employees' rights by denying to them the use of the employer's property. In the instant case the Board found that to deny the employees the right to distribute union literature on the parking lots would, because of the circumstances under which they work and live, make it practically impossible for them to realize the benefits of the Act. It found further that to permit the distribution of union literature on the parking lots would impose little, if any, detriment upon legitimate interests of the employer, and that the employer remained free completely to protect his interests by methods which did not adversely affect the rights of the employees.

ARGUMENT

The Board properly found that application of the company's "no-distribution" rule to prevent the distribution of union literature by employees on parking lots interfered with the exercise of rights guaranteed in Section 7 and violated Section 8 (1) of the Act

It is undisputed that the Company suspended Ferguson and Ayers as a penalty for distributing union handbills. Since an employer engages in discrimination within the meaning of Section 8 (3) of the Act whenever he discharges, refuses to hire, or otherwise punishes an employee for engaging in union activities which are protected by Section 7 of the Act (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 346–347; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 129; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 183, 185), the suspension of these two employees was unlawful unless the Company was privileged to prohibit its employees from engaging in the particular union activities involved.

Section 7 of the National Labor Relations Act declares that employees "shall have the right to self-organization, to form, join, or assist labor organizations * * *." Section 8 of the Act provides that "it shall be an unfair labor practice for an employer—(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." A literal reading of this section would indicate that any em-

ployer action which tends to obstruct or impede self-organizational activities falls within the statutory ban. So read, the statute would, of course, require abrogation of all plant rules which curtailed union solicitation on plant premises. But the Board has recognized that the statutory prohibition of interference, though absolute in terms, should be so construed as to harmonize, to the greatest possible extent, the employee interests which the statute seeks to protect with competing proprietary interests of employers (R. 40–41).[1]

The Board's approach thus follows closely that adopted by this Court in reconciling individual interests with community interests which demand curbs upon individual freedom. Governmental restraints upon freedom of communication give

[1] Compare the statement of the United States Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board v. Valley Service Oil Co.*, 122 F. (2d) 149, 152: "It may be argued that Section 8 of the Act forbids any interference whatever with the right of the employees to bargain collectively—in other words, that inconvenience and loss which may be occasioned to respondents by giving the Union representatives access to their ships has no bearing upon the rights of the seamen, which are guaranteed under Section 7. It would seem that a reasonable construction of the statute need not be as sweeping as this. Doubtless *interference must not be so substantial as to preclude the reasonable exercise of the employees' rights* but in determining what is a reasonable opportunity to bargain through chosen representatives we think *the Board may weigh the inconvenience, risk or damage imposed upon the employer against any mere convenience to the Union of access to the vessel.* The Board has done this and in our opinion reached a conclusion based upon substantial evidence." [Italics supplied.]

rise to the necessity, illustrated in *Martin* v. *Struthers*, 319 U. S. 141, 143, "of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens."

The right of employees to urge the advantages of self-organization, to proselytize and solicit members on behalf of labor organizations, and their correlative right "to receive aid, advice, and information from others"[*] concerning labor organizations, which the Act protects, are among the "fundamental rights" secured against governmental infringement by the First and Fourteenth Amendments. *Hague* v. *C. I. O.*, 307 U. S. 496, 510. Cf. *Thornhill* v. *Alabama*, 310 U. S. 88, 101–104. By protecting those basic rights from infringement by employers Congress sought to remove the primary and long standing source of obstructions to their exercise and thus to create conditions indispensable to the attainment of the statutory objectives. As the Board noted in the

[*] In *Matter of Harlan Fuel Co.*, 8 N. L. R. B. 25, 32, the Board stated: "The rights guaranteed to employees by the Act include full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment." See also, *Matter of Weyerhaeuser Timber Co.*, 31 N. L. R. B. 258, 264–265; *Matter of American Cyanamid Co.*, 37 N. L. R. B. 578, 585–586, 588; *Matter of Ozan Lumber Co.*, 42 N. L. R. B. 1073, 1079–1081.

instant case (R. 41), "employees cannot realize the benefits of the rights to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization." Therefore, whenever an employer blocks an effective avenue for communication of organizational information by promulgation or application of a plant rule, the Board must, to adapt the words of this Court, "be astute to examine the effect" of the employer's rule and "to weigh the circumstances and * * * appraise the substantiality of the reasons advanced in support [of it]." *Schneider* v. *State*, 308 U. S. 147, 161. Such an appraisal led the Board to conclude in the *Peyton Packing* case, 49 N. L. R. B. 828, 843–844, enforced on other grounds, 142 F. (2d) 1009 (C. C. A. 5), certiorari denied, October 9, 1944, No. 298, this Term, that in the absence of special circumstances an employer could prohibit union solicitation within the plant during working time but not during non-working time. This problem is now before the Court in *Republic Aviation Corp.* v. *National Labor Relations Board*, No. 226, this Term.

The right of employees to communicate organizational information encompasses communication

by means of the written as well as the spoken word. The Board pointed out that "speech is not the only mode of communication by which self-organization is effected, nor is it sufficient that this channel alone be free. Effective organization requires the use of printed literature and of application and membership cards, and these modes of communication are also protected by the Act" (R. 41). The Act, like the Constitution, "embraces the right to distribute literature, *Lovell* v. *Griffin*, 303 U. S. 442, 452, and necessarily protects the right to receive it." *Martin* v. *Struthers*, 319 U. S. 141, 143; *Jamison* v. *Texas*, 318 U. S. 413, 416. This Court has had occasion to note that "pamphlets have proved most effective instruments in the dissemination of opinion," *Schneider* v. *State*, 308 U. S. 147, 164; *Lovell* v. *Griffin*, 303 U. S. 444, 452; and that their distribution is essential to the cause of employee organization. *Martin* v. *Struthers*, 319 U. S. 141, 145–146.

Door-to-door distribution of leaflets, the method considered by this Court in the *Struthers* case, can be effectively utilized by labor organizations only where the homes of the workers involved are practically contiguous, for example, in company towns or in communities where the workers' homes are clustered about the plant. The obvious practical hardships which would attend any attempt to distribute literature to the homes of employees scattered throughout a large city or

over a wide rural area are enormously increased in wartime by transportation difficulties. When door-to-door distribution is impractical, employee organizations must rely heavily upon distribution at plant gates if they are to get printed matter into the hands of the employees.[*] If employees upon leaving the plant step out onto a public street or highway, utilization of the employer's property for the purpose of distributing organizational literature is not, of course, indispensable to the full exercise of their rights under the Act. Therefore, under such circumstances, where the distribution of union literature on company property would impose any "inconvenience, risk or damage" (*National Labor Relations Board v. Cities Service Oil Co.*, 122 F. (2d) 149, 152 (C. C. A. 2)) upon the employer, the Board finds

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[*] Weyforth, William O., *The Organizability of Labor* (1917), p. 16; Walsh, Raymond F., *C. I. O. Industrial Unionism In Action* (1937), pp. 69, 131, 169, 170; International Ladies' Garment Workers' Union, *Handbook of Trade Union Methods* (1937), p. 11; Brooks, R. R., *When Labor Organizes* (1938), p. 10; Brooks, R. R., *As Steel Goes* (1940), p. 117 and accompanying photograph. See also, *Matter of Karp Metal Products Co., Inc.*, 42 N. L. R. B. 119, 134–135, enforced, 134 F. (2d) 954 (C. C. A. 2); *Matter of Revlon Products Corp.*, 48 N. L. R. B. 1202, 1207–1208, enforced 144 F. (2d) 88 (C. C. A. 2); *Matter of Wells-Lamont-Smith Corp.*, 42 N. L. R. B. 440, 448; *Matter of Kohen-Ligon-Eglz, Inc.*, 36 N. L. R. B. 1294, 1299–1300, enforced, 128 F. (2d) 502 (C. C. A. 5); *Matter of Paragon Die Casting Co.*, 27 N. L. R. B. 878, 881, 883, 886. See *Republic Aviation Corp.* v. *National Labor Relations Board*, No. 226, this Term, transcript of record, p. 66.

that protection of the statutory interests of employees does not require that such distribution be permitted. This was the situation in *Matter of Tabin-Picker & Co.*, 50 N. L. R. B. 928. In that case, although the plant was located in a large city, Chicago, and house-to-house distribution was not feasible, there were no special circumstances which made it difficult or impossible to distribute organizational literature to the employees on the street as they left the building. The employer prohibited the distribution of literature within the plant, and thereafter discharged an employee who in violation of the rule distributed handbills announcing a union meeting. The Board held that the employer's conduct was not in violation of the Act and stated, "In the interest of keeping the plant clean and orderly it is not unreasonable for an employer to prohibit the distribution of literature on plant premises at all times." 50 N. L. R. B. at 930.[10]

On the other hand, if an employer interferes with the distribution of union literature on the

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[10] Accord, *Matter of North American Aviation, Inc.*, 56 N. L. R. B. 959; *Matter of Goodyear Aircraft Corporation*, 57 N. L. R. B. 502. In the latter case the Board, upholding an employer's prohibition of the distribution of union membership cards "within the plant, where production is being carried on," said: "We are not convinced that, under the circumstances disclosed here, the protection of the respondent's interest in maintaining plant cleanliness is outweighed by the interest of its employees in engaging in the type of activity banned by the respondent as a tactic in union organization." But cf. *Matter of Sledge Mfg. Co.*, 58 N. L. R. B., No. 232.

street in front of his plant (*Matter of Spalek Engineering Company*, 45 N. R. B. 1272, 1276–1279; *Matter of Revlon Products Corp.*, 48 N. L. R. B. 1202, 1203, 1209–1212, enforced, 144 F. (2d) 88 (C. C. A. 2); *Matter of Paragon Die Casting Co.*, 27 N. L. R. B. 878, 881, 886) or at the homes of his employees, his conduct is unquestionably violative of the Act.

Often, because of geographic or other circumstances under which employees work and live, organizational information cannot be placed in their hands at places other than the employer's property. For example, employees who work and live in company towns or on board ship can be approached only on the employer's property. Frustration of the organizational rights of such employees by the promulgation and enforcement of rules prohibiting union activity on the employer's premises or by the denial of access to the employer's property to union organizers was a familiar phenomenon prior to the passage of the National Labor Relations Act.[11] After passage

[11] U. S. Commission on Industrial Relations, Final Report of Commission * * * Vol. 1 (1916), pp. 78–79; U. S. Coal Commission, *Labor Relations in Bituminous Mining*, part 3 (1925), p. 1331; *The Company Town*, submitted to the United States Coal Commission by the Bituminous Operators Special Committee, Sept. 8, 1923; Fitch, John A., *The Causes of Industrial Unrest* (1924), pp. 189–191, 197, 206; Encyclopedia of Social Sciences, *Mining-Labor*, by Isador Lubin, Vol. 10 (1935), p. 501; Hinrichs, A. F., *The United Mine Workers of America and the Non-Union Coal Fields* (1923), p. 63;

of the Act the Board and the courts recognized that the rights there guaranteed were invaded by employers who utilized their control over property in this manner.[2] The Board and the courts

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Mitchell, George Sinclair, *Textile Unionism and the South*, University of North Carolina Press (1931); *Seamen's Journal*, April 4, 1934, p. 55; Paul F. Brissenden, *Employment System of the Lake Carriers' Association*, Bureau of Labor Statistics, Bull. No. 235 (1918), pp. 24–25; Chafee, Zachariah, *The Inquiring Mind*, New York, Harcourt Brace (1928), pp. 17–176; U. S. Commission on Industrial Relations, *Report on the Colorado Strike*, by George P. West (1915), pp. 15, 58; Annual Report of the Department of Labor (1913), pp. 21–22; Annual Report of the Department of Labor (1917), p. 32; "The Steel Strike" in *Monthly Labor Review*, by Mrs. M. A. Gadsby, Dec. 1919, pp. 83, 91; Davis, H. B., *Company Towns*, Encyclopedia of Social Sciences, Vol. 4 (1931), p. 121; U. S. Senate, *West Virginia Coal Fields*, *Report* No. 457, 67th Cong., 2d sess. (1922); U. S. Bureau of Labor Statistics, *National War Labor Board* (1923), Bull. No. 287, p. 29; U. S. Coal Commission, *Labor Relations in Bituminous Mining*, part I (1925), p. 156.

[2] In its Sixth Annual Report the Board said: "In industries where the employees must spend virtually all of their time upon the employer's property, it is apparent that the employer can effectively prevent their enjoyment of these rights by denying union representatives access to its property. The Board has accordingly held that the exclusion of union representatives from the employer's property under such circumstances constitutes 'serious interference' with the exercise of the rights guaranteed in Section 7." National Labor Relations Board, *Sixth Annual Report* (Gov't Print. Off., 1942), pp. 43–44. Among the cases so holding are the following: *Matter of Harlan Fuel Co.*, 8 N. L. R. B. 25, 31–32, 63 (employees living in company town denied access to union representative); *Matter of West Kentucky Coal Co.*, 10 N. L. R. B. 88, 105–106, 133 (*idem*), enforced, 116 F. (2d) 816 (C. C. A. 6); *Matter of American Cyanamid Co.*, 37 N. L. R. B. 578, 585–586, 588 (segregation of white and

have uniformly held that rules barring employee organizational activities on company premises which are either adopted, or applied discriminatorily, for the purpose of impeding self-organization, are violative of the Act.[18] But, although plant rules which discriminate against union solicitation or the distribution of union literature (e. g., rules which permit solicitation for all causes except unions, or which permit distribution of all types of literature except union literature) are, like laws which discriminate against freedom of speech, by that token alone rendered invalid, proof of non-discrimination does not, in either case

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colored employees in company town used to prevent interchange of union information); *Matter of Ryan Lumber Co.*, 42 N. L. R. B. 1073, 1079–1081, 1084 (*idem*); *Matter of Weyerhaeuser Timber Co.*, 31 N. L. R. B. 258, 264–267, 270 (employees living in company owned logging camp denied access to union representatives); *Matter of Waterman Steamship Corp.*, 7 N. L. R. B. 237, enforced, 309 U. S. 206, 224–226 (employees living aboard ship denied access to union representatives); *Matter of Cities Service Oil Co.*, 25 N. L. R. B. 36, 57 (*idem*), enforced, (122 F. (2d) 149, 152 (C. C. A. 2); *Matter of Richfield Oil Corp.*, 49 N. L. R. B. 593 (*idem*), enforced, 143 F. (2d) 860 (C. C. A. 9); *Matter of Seas Shipping Co.*, 4 N. L. R. B. 757 (*idem*).

[18] *National Labor Relations Board* v. *William Davies Co.*, 135 F. (2d) 179, 181 (C. C. A. 7), certiorari denied, 320 U. S. 770 (discriminatory promulgation of no-solicitation rule); *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. (2d) 714, 716–717 (C. C. A. 8) (*idem*); *Matter of Sledge Mfg. Co.*, 58 N. L. R. B., No. 232 (discriminatory promulgation of rule prohibiting distribution of "handbills or cards"); *National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. (2d) 810, 811 (C. C. A. 10) (discrimina-

establish their legality. Just as a state law "certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them

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tory promulgation and enforcement of no-solicitation rule); *National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. (2d) 1009, 1010 (C. C. A. 5), certiorari denied, October 9, 1944, No. 298, this Term (*idem*); *National Labor Relations Board* v. *M. E. Blatt Co.*, 143 F. (2d) 268, 271–273 (C. C. A. 3), certiorari denied, November 13, 1944, No. 553, this Term (*idem*); *National Labor Relations Board* v. *Kohen-Ligon-Folz, Inc.*, 128 F. (2d) 502, 503 (C. C. A. 5), enforcing 36 N. L. R. B. 1294, 1299–1303 (discriminatory application of rule prohibiting distribution of literature on plant premises); *Matter of Jensen Radio Mfg. Co.*, 27 N. L. R. B. 813, 830–831 (*idem*); *National Labor Relations Board* v. *Glenn L. Martin Nebraska Co.*, 141 F. (2d) 371, 372 (C. C. A. 8) ~~(discriminatory application of rule prohibiting distribution of literature on plant premises); *Matter of Jensen Radio Mfg. Co.*, 27 N. L. R. B. 813, 830–831 (*idem*); *National Labor Relations Board* v. *Glenn L. Martin Nebraska Co.*, 141 F. (2d) 371, 372 (C. C. A. 8)~~ (discriminatory application of no-soliciting rule; *National Labor Relations Board* v. *Columbia Products Corp.*, 141 F. (2d) 687, 688 (C. C. A. 2) (discriminatory application of no-visiting rule); *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. (2d) 657, 659–660 (C. C. A. 2), affirmed, 312 U. S. 660 (discriminatory refusal to permit one of two contesting unions to use company premises for holding meetings); *Matter of Wallace Mfg. Co.*, 2 N. L. R. B. 1081, 1085, 1090, 1093, enforced, 95 F. (2d) 818, 820 (C. C. A. 4) (*idem*); *Matter of Berkshire Knitting Mills*, 46 N. L. R. B. 955, 966–968, 977, enforced, 139 F. (2d) 134, 139 (C. C. A. 3), certiorari denied, 322 U. S. 741 (*idem*); *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 225–226 (discriminatory refusal to issue shipboard passes to union representative); *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480, 482–483 (C. C. A. 5) (*idem*), certiorari denied,

all alike,"[14] so an employer's rule does not acquire immunity from the statutory injunction against interference because it classifies union literature along with types of printed matter which have no specific statutory protection and bans the distribution of all alike. This and other Courts have held that the Act is violated whenever an employer engages in conduct which tends to interfere with the free exercise of rights guaranteed to employees by the statute, even though the employer is not motivated by anti-union animus and does not intend by his conduct to violate the Act.[15]

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313 U. S. 582; *National Labor Relations Board* v. *Gallup American Coal Co.*, 131 F. (2d) 665, 667 (C. C. A. 10) (discriminatory denial of sign posting privileges on company premises).

[14] *Murdock* v. *Pennsylvania*, 319 U. S. 105, 115.

[15] Absence of illegal motive or intent is no more determinative of the validity of the employer's conduct than is absence of intent to violate the Constitution determinative of the validity of legislation which is alleged to infringe constitutionally guaranteed civil rights. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520–521; *National Labor Relations Board* v. *Whittier Mills Co.*, 123 F. (2d) 725, 727 (C. C. A. 5); *National Labor Relations Board* v. *Jahn & Ollier Engraving Co.*, 123 F. (2d) 589, 593 (C. C. A. 7); *National Labor Relations Board* v. *Burry Biscuit Corp.*, 123 F. (2d) 540, 543 (C. C. A. 7); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. (2d) 528, 532, 533 (C. C. A. 6); *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470 (C. C. A. 9); *National Labor Relations Board* v. *Cities Service Oil Co.*, 122 F. (2d) 149, 152 (C. C. A. 2); *Republic Aviation Corp.* v. *National Labor Relations Board*, 142 F. (2d) 193, 196 (C. C. A. 2), certiorari granted.

Where the only practical method of distributing union literature to employes depends upon utilization of the employer's property, the Board is called upon to decide whether such activity would impose upon the employer a detriment so severe as to justify prohibition of the distribution and consequent frustration of the employees' rights under the Act (R. 41–43). In the instant case the Board first considered the extent to which the Company's rule, insofar as it prohibited distribution of union literature by employees on the parking lots, deprived them of "the freedom of communication which is essential to the exercise of the right to self organization" (R. 41). The Board found that:

> * * * respondent's plant is located in the country in the heart of 6,000 acres of land owned by it or its subsidiary. Apart from U. S. Highway No. 13 (and perhaps the intersecting road), the respondent and its subsidiary own all the land adjacent to the plant. This, in itself, seriously limits

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October 9, 1944, No. 226, this Term; *South Atlantic Steamship Co.* v. *National Labor Relations Board*, 116 F. (2d) 480, 482 (C. C. A. 5), certiorari denied, 313 U. S. 582; *National Labor Relations Board* v. *Gluck Brewing Co.*, 144 F. (2d) 847, 851–854 (C. C. A. 8); *Richfield Oil Corp.* v. *National Labor Relations Board*, 143 F. (2d) 860, 862 (C. C. A. 9); *National Labor Relations Board* v. *Engineering & Research Corp.*, decided October 12, 1944 (C. C. A. 4); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, 313 U. S. 565; *American Smelting & Refining Co.* v. *National Labor Relations Board*, 126 F. (2d) 680, 685 (C. C. A. 8).

> the possibilities of effectively communicating with the bulk of the respondent's employees. This limitation would not, however, be too restrictive if the respondent's gate opened directly onto the highway; for then persons could stand outside the respondent's premises and distribute literature as each employee entered or left the plant. But at the respondent's plant the gate is 100 feet back from the highway, on company property. Over 60 percent of the respondent's employees, after passing the gate, enter automobiles or buses parked in the space between the gate and the highway [i. e. the North parking lot], and presumably speed homeward, without ever setting foot on the highway. Distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is consequently seriously impeded (R. 41–42).

The Board further found that because "the employees' homes are scattered over a wide area," house-to-house distribution of literature was highly impracticable (R. 42), and that "In the absence of a list of names and addresses, * * * direct contact with the majority of the respondent's employees away from the plant would be extremely difficult" (R. *id.*). Here then, since the bulk of employees do not upon leaving the plant step out into a public street or highway, essential organizational literature can be dis-

tributed to them in the normal fashion only if the would-be distributors are permitted to use the parking lots (R. 42, 66–67).[16]

After emphasizing that enforcement of the Company's rule under these circumstances foreclosed a vital avenue of communication and made it virtually impossible for the Company's employees to "realize the benefits of the right to self-organization guaranteed them by the Act" (R. 41; cf. *Matter of Republic Aviation Corp.*, 51 N. L. R. B. 1186, 1193, enforced, 142 F. (2d) 193, certiorari granted, October 9, 1944, No. 226, this Term), the Board proceeded to consider the possible detriment to the Company's interests which would result from abrogation of the rule as applied to the parking lots. The Company contended first that its rule was necessary to prevent the littering of its parking lots. The Board recognized that the Company had a legitimate interest in preventing littering but it found that the danger of littering neither necessitated nor justified a rule precluding distribution of union literature on the parking lots. It pointed out that the

[16] The only practical alternative to distribution on the parking lots would be distribution within the plant itself. Since, as the Board pointed out in the *Tabin-Picker* case, *supra*, distribution of union literature within a production plant would be likely to impose some detriment upon the employer, the Board did not order the Company to permit such distribution within the plant. Whether, if no alternative method of distribution were available, the Board would order an employer to permit distribution of literature within the plant would depend upon its appraisal of the benefit-prejudice considerations set out below.

littering of parking lots is by no means as serious to an employer as would be littering "within buildings where production is being carried on * * *" (R. 42; 78, 71–72). The necessity of cleaning litter from parking lots, like the necessity of cleaning it from city streets, is at most a "minor nuisance." *Martin* v. *Struthers*, 319 U. S. 141, 143. But the Board's order, as it noted, does not require the Company to bear even this minor burden, since it does not deprive the Company of the power to prevent the littering of its parking lots (R. 42). The same "obvious methods of preventing littering" (*Schneider* v. *State*, 308 U. S. 147, 162) which may result from the distribution of printed matter are open to an employer as are open to a municipality which wishes to keep its streets clean. "Amongst these is the punishment of those who actually throw papers" on the parking lots. The best way to prevent littering, as the Company's plant manager in effect conceded at the hearing (Tr. 121–122), is to make a rule against littering. This Court's holding that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it * * *": (*Schneider* case, 308 U. S., at p. 162), is paralleled by the Board's conclusion in the instant case that an employer's similar purpose does not justify a rule which prohibits an employee who is rightfully and necessarily on the

parking lot from there handing union literature to those of his fellows who are willing to receive it.

The Company's second contention, that its rule is necessary in order to prevent literature from being brought into the plant where it might allegedly interfere with efficiency and endanger the safety of machines and employees, was rejected by the Board as without merit. The Board pointed out that the Company does not attempt to prevent employees from bringing newspapers or other reading matter into the plant; in fact, the Company places copies of its magazine in boxes near the plant gate, which employees can take with them into the plant (R. 43). It is evident, therefore, as the Board found (*id.*), that the Company does not sincerely fear that the distribution of literature on its parking lots would have any appreciable effect upon the efficiency and safety of operations within the plant. Even if such a danger did exist, it could easily be met within the framework of the Board's order. As the Board pointed out a "rule barring the carrying of literature * * * into the plant * * * would provide a better safeguard against the impairment of efficiency and safety in the plant than a rule directed at distribution, and would not be subject to the same objections." (R. 43).

The Company's final contention that the rule is necessary to prevent thefts from automobiles

left on its parking lots, is manifestly untenable. Thefts, which had occurred while the Company permitted non-employees to distribute commercial advertisements on the parking lots (R. 37; 80–81), admittedly ceased when access to the lots was denied to outsiders and guards were stationed on the lots (R. 33, 79; Tr. of oral argument before the Board, 33). The Company's no-distribution rule can have no tendency to prevent thefts by employees since, as the Board found, they are allowed "free access to the lots in any event" (R. 42). Insofar as the rule tends to prevent thefts by outsiders it remains precisely as effective after the Board's order as before; the order does not require the Company to grant access to its parking lots to outsiders, having no legitimate business on its premises.[17]

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[17] The facts in the instant case do not present and the Board did not consider the question which would arise if union representatives who were not employed at the plant sought to distribute literature on the parking lots. The same benefit-prejudice considerations which the Board deemed controlling in this case must be applicable to such a situation, and the consistent holdings of the Board and the courts that an employer may not deny access to his property to union representatives when access is necessary to enable the employees to exercise their rights under the Act intelligently (n. 12, pp. 20–21, *supra*), would indicate that, subject to whatever safeguards may be appropriate (Cf. *Martin* v. *Struthers*, 319 U. S. 141, 143); union representatives, no less than employees, should be permitted to distribute literature on the parking lots (Cf. Brief for the United States as Amicus Curiae in *R. J. Thomas* v. *Collins*, No. 14, this Term, pp. 14–15, 28–29, 34–36).

The Company's assertion that if it were required to permit its employees to distribute union literature on the parking lots it could not "rightfully deny to other members of the public and other employees the right to distribute other literature" (Company's brief in the court below, p. 6) is based on a *non sequitur*. The requirement that an employer fulfill his statutory obligation of non-interference with the dissemination of self-organizational information by employees and their representatives no more prevents him from prohibiting the dissemination of other types of printed matter by either employees or the public at large than does the constitutional requirement that governmental agencies refrain from infringing upon freedom of the press prevent them from restricting the distribution of commercial handbills. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 111; *Valentine* v. *Chrestensen*, 316 U. S. 52, 54–55; *Schneider* v. *State*, 308 U. S. 147, 165. (Cf. pp. 20–23, *supra*.)

The most significant reason offered by the Company for the application of its no-distribution rule to union literature appears clearly from the following statement in its brief in the court below (p. 6): "since an election was held the result of which was against the Union * * * distribution of [union] literature pro and con would necessarily engender strife." The court below evidently adopted this suggestion as justification for the rule. After citing with approval the rea-

soning of the Circuit Court of Appeals for the Sixth Circuit in *Midland Steel Products Co. v. National Labor Relations Board*, 113 F. (2d) 800,[18] the court said: "Unfortunately organization efforts often produce excitement and feeling among the employees, even exhibitions of violence" (R. 93). But this argument proves too much. It would serve equally well to justify prohibition not only of the distribution of union literature but of union discussion or solicitation, at any place, because such activities might cause so much hostility between employees as to interfere with their harmonious relations during working hours. What this argument really amounts to is that an employer should be permitted to ban any activity which might create differences of opinion among employees about joining a union or remaining aloof. The insubstantiality of the Company's fears that the distribution of union literature would "engender strife" and thus interfere with production is apparent in the light of the fact that the Company does not find it necessary or desirable to prohibit oral solicitation and discussion about unions on its premises, conduct which, on

[18] In the *Midland* case the court held that an employer's rule which prohibited union solicitation on plant premises during non-working as well as working hours was not violative of the Act. The court found justification for the rule in the alleged fact that, "Solicitation, argument, the hurling of epithets in tense discussion before work has been commenced or in the noon hour, may reasonably be expected to carry a certain animus over into work hours." 113 F. (2d) 800, 805-806.

the reasoning of the court below, would have at least as great a tendency to "produce excitement and feeling" (R. 93) among the employees as would the distribution of promotional literature. If oral discussion and solicitation for unions on the Company's premises does not result in manifestations of "feeling" or "violence" which interfere with production, it is difficult to understand how the dissemination of union literature could do so.

The instant case, as the Board pointed out (R. 40), "requires an evaluation of conflicting rights and policies—the employer's right to regulate the use of his own property, on the one hand, as against the employees' right to receive information to enable them to exercise their right to self-organization, which it is the policy of the Act to encourage." The Circuit Court of Appeals for the Second Circuit in discussing the analogous situation presented in the *Republic* case, said that it is for the Board to determine in such cases "(1) what in fact will be the prejudice to the interests of the employer in allowing [the particular union activity involved] to go on * * * and what will be the benefit to the employees; and what will be his benefit and their prejudice in disallowing it; (2) whether the benefit shall prevail over the prejudice, or vice versa" (142 F. (2d) 193, 196). And the court in that case properly recognized that "only in cases where [the reviewing courts] believe that there is no

reasonable warrant for the priority actually awarded" (*id.*) may the Board's order be set aside. The Board's conclusion in the instant case that the Company's rule, insofar as it conflicts with the statutory policy of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Section 1), must give way, was based, as we have shown above (*supra*, pp. 24–32), upon a careful appraisal of the prejudice to the employees and benefit to the employer which would flow from continued enforcement of the rule and of the possible prejudice to the employer and benefit to the employees which might result from its partial abrogation. In view of the Board's findings that no prejudice whatever would result to the Company from partial abrogation of the rule, whereas its continued enforcement would render self-organization among the Company's employees virtually impossible of attainment, the Board was clearly justified in awarding "priority" to the interests of the employees. Certainly it cannot be said that there is "no reasonable warrant" for the Board's conclusion; consequently, under the principles of judicial review applied by the Second Circuit, which, we submit, are entirely proper, the Board's decision should have been sustained.

The court below did not set aside as unsupported by the evidence, any of the Board's findings of fact concerning the repercussions of the

Company's rule upon the interests of the employees and of the employer. Nor did it hold that upon those findings the Board's conclusion, that protection of the statutory interests of the employees demanded abrogation of the rule to the extent directed by the Board's order, was unreasonable. Instead, unlike the Circuit Court of Appeals for the Second Circuit, it failed to accord any weight whatever to the Board's construction of the statute; it excluded as irrelevant any consideration of the extent to which the rule as applied deprived employees of practical opportunity to exercise the rights which the statute, in the public interest, conferred upon them; and it completely disregarded the Board's determination that under the circumstances here presented, on balance, the interests of the employees should prevail. The court below thereby disregarded the principle often enunciated by this Court that upon such questions "the experienced judgment of the Board is entitled to great weight." *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678, 682, 684; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 130–131; *Dobson* v. *Commissioner,* 320 U. S. 489, 500–501, and cases therein cited.

In place of the Board's considered approach, which gives effect to the language of the statute proscribing employer "interference" and at the same time recognizes that limitations upon self-organizational activities may at times be appro-

priate when such activities conflict with substantial, legitimate employer interests, the court below substituted its own rule—that an employer may insist "that the employees discuss and act in the matter of their own organization elsewhere than on the employer's property" (R. 93). The court's rule rests on the fallacious assumption that employees lose their rights under the Act when they enter the employer's property. As we have shown above (*supra*, pp. 18-20), the Board and the courts have uniformly held that an employer may not deny access to his property to union organizers and thereby block an essential avenue of communication between employees and those through whom they can make their statutory rights effective. And even the court below recognizes that an employer cannot lawfully insist "that the employees discuss and act in the matter of their own organization elsewhere than on the employer's property," if his motive in doing so is to discourage or impede self-organization. *National Labor Relations Board* v. *Peyton Packing Co.*, 142 F. (2d) 1009 (C. C. A. 5), certiorari denied, October 9, 1944, No. 298, this Term. Since the employer's motive, as we have demonstrated (*supra*, pp. 21–23), is not the decisive factor in determining whether conduct which interferes with full freedom of self-organization is violative of the Act, the right of employees to have access to information and advice necessary to enable them to exercise their rights under the Act cannot be

made to depend upon the employer's motive in denying such access to them.

The Company itself concedes that there must be some accommodation between its right to regulate the use of its property and the statutory rights of the employees, for it admits (Company's brief in the court below, 10; see also Tr. 219–221, 236–237) that a no-distributing rule, if applied to the entire six thousand acre tract of land, "might be too restrictive." Yet, under the rule applied by the court below, the Board would be powerless to find even such a rule violative of the Act. In sum, the theory adopted by the court below would permit any employer who controls the property on which his employees work and live to foreclose every avenue of communication of organizational information to and between his employees and thus effectively to preclude them from obtaining the benefits of the Act. So to construe the statute would frustrate attainment of its objectives in a large segment of American industry.

The same vices inhere in the approach of the Circuit Courts of Appeals for the Fifth, Sixth, Eighth, and Tenth Circuits to cases involving the validity of rules prohibiting union solicitation on an employer's property during non-working as well as working time. *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800, 805, 806 (C. C. A. 6); *National Labor Relations Board* v. *Williamson-Dickie Mfg. Co.*, 130 F. (2d) 260, 264, 267–268 (C. C. A. 5); *Carter*

Carburetor Corp. v. *National Labor Relations Board*, 140 F. (2d) 714, 716 (C. C. A. 8); *National Labor Relations Board* v. *Denver Tent & Awning Co.*, 138 F. (2d) 410, 411 (C. C. A. 10); *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 423, 435 (C. C. A. 10). These courts adopt the view that no-solicitation rules cannot be found to violate the Act, no matter how serious their effect upon the exercise of self-organizational rights, if the rules are "reasonable."[19] They hold further that the "reasonableness" of such rules is a matter of law to be determined exclusively by the courts.[19] This is a usurpation of administrative functions (pp. 32–34, *supra*).

[19] This approach is exemplified by the opinion of the Sixth Circuit in the *Midland* case (113 F. (2d) at p. 805): "Since the rule was violated, the discharge was lawful unless the rule was unreasonable and hence null and void. * * * Whether this rule was reasonable is a question of law for the court to determine. *Little Rock & M. Rd. Co.* v. *Barry*, 8 Cir., 84 F. 944, 43 L. R. A. 349; *Missouri, K. & T. Ry. Co.* v. *Collier*, 8 Cir., 157 F. 347; *Chicago, R. I. & P. Ry. Co.* v. *Ship*, 8 Cir., 174 F. 353; *Central Rd. Co. of New Jersey* v. *Young*, 3 Cir., 200 F. 359, L. R. A. 1916E, 927."

It is noteworthy that the cases cited by the court to support the proposition that the "reasonableness" of employer rules is for the courts to determine did not arise under the Act. Obviously the question of whether court or jury is the proper tribunal to decide the "reasonableness" of working rules when these are challenged in a negligence action by an employee is entirely unrelated to the question whether, under the statutory scheme created by Congress, the Board or the court is the proper tribunal to decide whether an employer's rule which infringes rights guaranteed by the statute is "reasonable." The answer to the latter question is indicated by reference to Section 10 (e) of the Act and the applicable deci-

Moreover, in determining the reasonableness of such rules, these courts apply a different standard than that applied by the Board. They disregard the interests of employees which the Act protects, and determine "reasonableness" solely in relation to the alleged common law right of employers to control the use of their property and the conduct of their employees. Such an approach is no more appropriate in these cases than it was in the *Hearst* case, *supra*, or in *Securities & Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 87, 89, 90–92. As the Second Circuit pointed out in the *Republic* case (142 F. (2d) 193, 196), when a tribunal is called upon to determine questions of "reasonableness," which arise in many fields of the law, it "balances the interests against each other, and awards priority as seems to it just." But if courts exclude from consideration the statutory interest of employees in self organization, their finding that an employer's rule is "reasonable" could not be the product of a balancing of employer and employee interests but is simply a conclusion based on the erroneous premise that employees lose their statutory rights upon entering the employer's property. To assert that an employer has the power absolutely to prohibit self-organizational activities on factory grounds as an exercise of his plenary control over such

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sions of this Court cited above (p. 34), which, we submit, have been properly interpreted by the Circuit Court of Appeals for the Second Circuit in the *Republic* case.

property is as irreconcilable with the limitations imposed by the Act as is the analogous assertion by a municipality that "as an exercise of the city's plenary control of its streets * * * it has the power absolutely to prohibit the use of the streets for the communication of ideas" irreconcilable with the limitations imposed by the Constitution. *Jamison* v. *Texas*, 318 U. S. 413, 415–416. It is rather the Board's approach in these cases which comports with judicial standards, for, as in the instant case, a Board finding as to the reasonableness of an employer's rule rests not upon a disregard of the interests of one of the parties affected by its decision but upon a careful appraisal of the interests of both parties. In resolving whatever conflict exists between them, the Board seeks to accomplish "the greater good" (R. 40).

In support of its conclusion that an employer may lawfully prohibit all self-organizational activities on his premises, the court below stated that under Section 8 (2) of the Act an employer "cannot facilitate the organization [of his employees] even by providing a meeting place without incurring the charge that he is attempting to dominate it" (R. 93). If by this the court intended to imply that Section 8 (2) compelled the Company to prohibit the distribution of union literature on its parking lots the court we submit was clearly in error. It is true, of course, that an employer's grant to a labor organization of such valuable

facilities as a meeting place,[20] bulletin boards,[21] clerical[22] or legal services[22] and the like, con-

[20] *Matter of Berkshire Knitting Mills*, 46 N. L. R. B. 955, 977, enforced, 139 F. (2d) 134, 139 (C. C. A. 3), certiorari denied, 322 U. S. 747; *Matter of Cudahy Packing Co.*, 14 N. L. R. B. 302, 316, enforced, 118 F. (2d) 295 (C. C. A. 10); *Matter of Western Garment Mfg. Co.*, 10 N. L. R. B. 567, 570, 573; *Matter of J. Greenebaum Tanning Co.*, 25 N. L. R. B. 672, 675, 684, 685, enforced by consent, January 26, 1942 (C. C. A. 7); *Matter of Virginia Electric & Power Co.*, 44 N. L. R. B. 404, 415–418, 425, enforced, 319 U. S. 533; *Matter of Hancock Brick & Tile Co.*, 44 N. L. R. B. 920, 924; *Matter of Norfolk Shipbuilding & Drydock Corporation*, 12 N. L. R. B. 886, 891, 893, enforced, 109 F. (2d) 128, 129 (C. C. A. 4); *Matter of Houde Engineering Corp.*, 42 N. L. R. B. 713, 722, 725; *Matter of Carlisle Lumber Co.*, 2 N. L. R. B. 248, 270–271, enforced, 94 F. (2d) 138, 143 (C. C. A. 9), certiorari denied, 304 U. S. 575; *Matter of Lane Cotton Mills Co.*, 9 N. L. R. B. 952, 969–970, enforced, 111 F. (2d) 814, 816 (C. C. A. 5); *Matter of Bradford Dyeing Assn.*, 4 N. L. R. B. 604, 613–614, enforced, 310 U. S. 318, 335.

[21] *Matter of John A. Roebling's Sons Co.*, 17 N. L. R. B. 482, 499–500, enforced, 120 F. (2d) 289, 293 (C. C. A. 3); *Matter of Western Union Telegraph Co.*, 17 N. L. R. B. 34, 63, 137, enforced, 113 F. (2d) 992, 995 (C. C. A. 2); *Matter of General Motors Corp.*, 14 N. L. R. B. 113, 120–122, enforced, 116 F. (2d) 306, 308–309 (C. C. A. 7).

[22] *Matter of Calico Rope Works, Inc.*, 4 N. L. R. B. 1100, 1110; *Matter of Todd Shipyards Corp.*, 5 N. L. R. B. 20, 34–35; *Matter of M. Lowenstein & Sons, Inc.*, 6 N. L. R. B. 216, 232, order enforced by consent, October 24, 1938 (C. C. A. 2); *Matter of Union Die Casting Co.*, 7 N. L. R. B. 846, 851; *Matter of Lady Ester Lingerie Corp.*, 10 N. L. R. B. 518, 524; *Matter of Rath Packing Co.*, 14 N. L. R. B. 805, 813, enforced, 115 F. (2d) 217, 219 (C. C. A. 8).

[23] *Matter of Remington Rand, Inc.*, 2 N. L. R. B. 626, 732, enforced, 94 F. (2d) 862, 868, 869 (C. C. A. 2), certiorari

stitutes support within the meaning of Section 8 (2).[24] But the Board has never held that mere non-interference by an employer with union solicitation or with distribution of union literature on his premises *during non-working time* amounts to illegal support. Nor could an employer be suspected of attempting to dominate a labor organization simply because of his acquiescence in such activities. Findings that an employer has dominated a labor organization within the meaning of Section 8 (2) depend upon "the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act con-

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denied, 304 U. S. 576; *Matter of Kiddie Kover Mfg. Co.*, 6 N. L. R. B. 355, 362–364, enforced, 105 F. (2d) 179 (C. C. A. 6); *Matter of Industrial Rayon Corp.*, 7 N. L. R. B. 878, 890.

[24] The Board stated in its Seventh Annual Report, "It is an unfair labor practice * * * for employers * * * to aid the [labor] organization by supplying financial aid or the use of company facilities such as bulletin boards, mailing lists or office space." National Labor Relations Board, Seventh Annual Report (Gov't. Print. Off., 1943), p. 45. In its Third Annual Report the Board cited cases in which it found that by "furnishing financial aid and various facilities to employee organizations, such as the use of bulletin boards, mimeograph machines, the Company automobile, stenographic services and office space and mailing lists" employers had violated Section 8 (2) of the Act. National Labor Relations Board, Third Annual Report (Gov't. Print. Off., 1937), pp. 113–114, see also p. 115.

templates." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 588. Such a finding must take into account the "whole congeries of facts" (*id.*) including "imponderable subtleties at work" which it is the Board's function to appraise. *National Labor Relations Board* v. *Virginia Electric & Power Company*, 314 U. S. 469, 479. Certainly, as this Court pointed out in the *Link-Belt* case, *supra*, "no one fact is conclusive."[25] Often, the grant of valuable facilities to a labor organization or the sanctioning of organizational activities on working time[26] is deemed by the Board an indication of employer favoritism

[25] Cf. Rosenfarb, *The National Labor Policy and How It Works* (1940), p. 115: "In virtually none of the cases have employer attempts at domination been along any single line of attack. Manifold activities have been resorted to to achieve this end. The Board, has, therefore, never had to decide as to the determinative effect of any one activity. In proceeding with the analysis of the ways and means of interference with company unions, the fact should not be lost sight of that the Board had dealt with them in a combination of circumstances."

[26] In determining whether a course of conduct constitutes a violation of Section 8 (2), "The Board has * * * considered the effects of employer's activities in permitting the conduct of organizational activities on the employer's premises during working hours with the consent of the employer." National Labor Relations Board, Third Annual Report (Gov't Print. Off., 1937), p. 113. See, for example, *Matter of Cudahy Packing Co.*, 17 N. L. R. B. 302, 317, 322-329, enforced, 118 F. (2d) 295 (C. C. A. 10) (circulation of union petition on working time); *Matter of Howe Scale Co.*, 47 N. L. R. B. 1399, 1403, 1413 (circulation of

toward a particular labor organization and as such an element of domination. Cf. H. Rep. 1147, 74th Cong., 1st Sess., pp. 18–19; *Matter of Berkshire Knitting Mills*, 46 N. L. R. B. 955, 977, enforced, 139 F. (2d) 134, 139–140 (C. C. A. 3), certiorari denied, 322 U. S. 747. But the normal inference of favoritism which arises from the grant of company time or facilities to a labor organization may be, and often is, rebutted by persuasive evidence of employer neutrality. For example, in *Matter of Mohawk Carpet Mills, Inc.*, 12 N. L. R. B. 1265, 1272–1273, the Board said:

> The fact that the respondent permitted solicitation of membership by the Amsterdam Union on company time would, ordinarily, be a strong circumstance indicating

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petitions, distribution of literature, solicitation, during working hours); *Matter of Todd Shipyards Corp.*, 5 N. L. R. B. 20, 34–35 (solicitation and meetings on company time); *Matter of H. J. Heinz Co.*, 10 N. L. R. B. 963, 970, 972, 973, 975, enforced, 311 U. S. 514 (solicitation during working hours); *Matter of West Kentucky Coal Co.*, 10 N. L. R. B. 88, 103, enforced, 116 F. (2d) 816 (C. C. A. 6) (circulation of membership cards during working hours); *Matter of Denver Automobile Dealers Ass'n.*, 10 N. L. R. B. 1173, 1204 (solicitation of members during working hours); *Matter of Hood Rubber Co., Inc.*, 14 N. L. R. B. 16, 24–33 (solicitation of members on company time); *Matter of Bradford Dyeing Assn.*, 4 N. L. R. B. 604, 612–614, enforced, 310 U. S. 318, 333–336 (circulation of membership cards during working hours); *Matter of Lane Cotton Mills Co.*, 9 N. L. R. B. 952, 989–790, enforced, 111 F. (2d) 814, 816 (C. C. A. 5) (meetings held during working hours).

> domination and interference with that organization. However, since the record shows that the T. W. O. C. [the charging union] was permitted like freedom in this regard, we cannot say that sponsorship and support of the Amsterdam Union are shown, within the meaning of the Act."

Normally, of course, the mere fact that an employer does not interfere with the solicitation of members on behalf of a labor organization during non-working time or with the distribution of union literature in a manner which does not impede production constitutes no evidence whatever of favoritism toward the labor organization involved, and we are aware of no case in which the Board has held to the contrary. Only if the employer interferes with the similar activities of a competing labor organization, or himself instigates the organizational activities, or affirmatively cooperates with a labor organization to increase the effectiveness of its proselytizing techniques by lending to them an appearance of employer sponsorship does his conduct take on the color of illegality.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision below should be reversed

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[11] Accord: *Matter of Ranco, Inc.*, 57 N. L. R. B. 425; *Matter of Poultry Producers of Central California*, 25 N. L. R. B. 347, 359.

and the cause remanded with directions to enforce the Board's order in full.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
MOZART G. RATNER,
Attorneys,
National Labor Relations Board.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are as follows:

SEC. 1.

* * * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * *

SEC. 10.

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of The United States

OCTOBER TERM, 1944

No. 452

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

v.

LeTOURNEAU COMPANY OF GEORGIA,
Respondent.

On petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MEMORANDUM FOR LeTOURNEAU COMPANY OF GEORGIA

Toccoa, Georgia
Gainesville, Georgia

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Attorneys for respondent,
LeTourneau Company of Georgia.

On the Brief:
C. M. McClure,
Toccoa, Ga.

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MEMORANDUM FOR LeTOURNEAU COMPANY OF GEORGIA

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 79-82) is reported in 143 F. (2d) 67. The findings of fact, conclusions of law and order of the Board (R. 55-73) are reported in 54 N. L. R. B. 1253.

JURISDICTION

The decree of the Circuit Court was entered June 23, 1944. We do not have the date of filing the petition for certiorari.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, U. S. C. A. Title 28, § 347, and § 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS FOR DECISION

Upon a charge made by United Steel Workers of America, CIO, National Labor Relations Board issued a complaint against LeTourneau Company of Georgia. (R. 16-19).

ACTS CHARGED AS VIOLATION OF NATIONAL LABOR RELATIONS ACT

The Board charged that respondent had suspended two named employees for two days each for distributing Labor Union literature outside the plant premises and because they had joined and assisted in the organization of a Union and engaged in concerted activities with other employees for their mutual aid and protection.

The sole overt acts charged are embraced in the language above. (R. 16-19) All other charges not embraced in the two acts above specified were dismissed by the Trial Examiner and no exception was made.

The Board contended that by the two acts specified above respondent had violated Section 7 and Section 8 (1) and (3) and Section 2 (6) and (7) of the Act. (R. 18-19)

By reference to the complaint (R. 18-19) it will be seen that it contains no charge that respondent had violated Section 1 of the Act.

By the petition (Appendix page 17) it seems to be now contended that respondent by said Act has violated Sections 1, 7, 8 (1) and (3).

INTERMEDIATE REPORT
(R. 32)

The Trial Examiner found that respondent had not engaged in the unfair labor practices as charged and recommended that the complaint be dismissed in its entirety. (R. 35-46-47).

DECISION OF BOARD

Upon exceptions by United Steel Workers of America and the Regional Attorney for the Board, the full Board reversed the decision of the Trial Examiner.

DECISION OF THE COURT

Respondent petitioned United States Circuit Court of Appeals, Fifth Circuit, to vacate and set aside the decision and order of the Board and by way of response to this petition the Board petitioned that Court

for an order or judgment directing the enforcement of its decision and order. The Circuit Court granted the petition of respondent, denied the petition of the Board and entered an order and decree vacating the Board's decision and order and it is this decision petitioner seeks to have vacated and set aside.

BASIS FOR DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS

Respondent employed more than two thousand people. For the convenience of its employees it graded and paved two parking lots where two to three hundred automobiles were parked daily. Merchants from nearby towns were in the habit of employing boys to distribute their advertisements among these employees. These boys and other distributors of pamphlets would enter these two parking lots, resulting in littering of the lots and a series of thefts from the automobiles. (R. 60).

The respondent, at its own expense, placed guards over these lots and kept them clean and in July, 1941, promulgated a rule that "in the future no merchant, concern, company, or individual, or individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on company property, without first securing permission from the personnel department". (R. 60) This is in the Board's finding of fact.

That this rule was promulgated and effective from July 3, 1941, there was no question. That the two men

who were suspended for two days each knowingly violated the rule, there is likewise no question. That both men continued in the service of respondent is also without question.

At the time the rule was promulgated there had been no effort to organize a Union at respondent's plant. In February, 1943, the Congress of Industrial Organizations commenced to organize respondent's employees. An election was held April 8, 1943, resulting in defeat of CIO. Thereafter the Union continued its effort to organize the employees. (R. 61).

The Board itself found:

> "In spite of the apparent lack of uniformity in the printed version of the respondent's rule against distributing literature on plant premises, it is uncontradicted in the record that, since July 3, 1941, the plant-protection force has strictly enforced a no-distributing-no-posting rule on the respondent's premises, including the two parking lots. There is no evidence that either outsiders or employees have been permitted to distribute literature of any kind on the lots since that time." (R. 61).

The Board also found:

> "That the record does not support a charge that the rule was discriminatorily enforced against Ferguson and Ayers. It is undisputed that the rule against distribution has been

applied to all persons without exception seeking to distribute literature on the parking lots where Ferguson and Ayers were apprehended." (R. 64).

We submit that under these undisputed facts the Board was without authority to find that respondent had violated any provisions of National Labor Relations Act, simply by suspending these two employees for two days each for an undisputed violation of a rule promulgated at a time when there was no thought of a Union at respondent's plant.

The record is without conflict that this rule was not enforced or attempted to be enforced at any place other than in the plant and on these two parking lots.

See Appendix, page 17, Petitioner's brief in Circuit Court and Vol. 2, R. 171, 236,237.

In substance the complaint against respondent that it had suspended the two employees, because they had joined, and assisted in the organization of a Union, was, by the Board's own decision, completely refuted.

Yet the Board seeks to say that notwithstanding the fact that respondent had in no way discriminated against the two men for Union activity, nevertheless, the rule though enforced without discrimination, amounts to a violation of the Act. We submit this is not tenable, and ought not to be ground for the grant of a certiorari.

LAW INVOLVED

If there is a conflict in the decision of the Circuit Court in this case and that of Republic Aviation Corporation v. National Labor Relations Board, 142 F. (2d) 193, then that case is the one that ought to be reviewed, and reversed, because it is in conflict with many dicisions among them being:

Midland Steel Product Co. v. National Labor Relations Board, 113 F. (2d) 800;

National Labor Relations Board v. Williamson-Dickey Co., 130 F. (2d) 260;

Carter Carburetor Company v. National Labor Relations Board, 140 F. (2d) 714;

National Labor Relations Board v. El Paso Electric Co., 133 F. (2d) 168.

It seems to us the decisions in the cases just cited are supported by better reason, and they are in harmony with the decision of this Court in National Labor Relations Board v. Jones & Laughlin S. Corporation, 301 U. S. 1, 81 L. E. 893, to the effect:

> "The National Labor Relations Act - - - - does not interfere with the normal exercise of the right of an employer to select his employees or discharge them, so long as he does not under cover of that right intimidate or coerce his ~~his~~ employees with respect to their self-organization and representation."

Since the Board itself found that respondent by enforcing its rule against distribution of literature did not discriminate against the employees in question, and in effect that the enforcement of the rule was not done under cover of a right to intimidate or coerce these employees with respect to their self-organization and representation—then it follows as the night follows the day that respondent could suspend these employees for good cause, or no cause.

National Labor Relations Board v. Blue Bell Globe Co., 120 F. (2) 974.

It is a sound and necessary policy that the power to review the decisions of Circuit Courts of Appeals be exercised sparingly and only in cases of gravity and importance. Surely the burdens now resting upon this Court with respect to its duty to this Nation at one of the most strategic points of history are enough without its being called upon to examine into a case where two men have been disciplined involving only four days time for the unquestioned violation of a rule without any discrimination against the men in question and who are continuing in the service of their employer.

Forsyth v. City of Hammond, et al, 166 U. S. 506, 41 L. E. 1095;

In re: John Woods, 143 U. S. 202, 36 L. E. 125;

Houston Oil Co. v. Goodrich, et al, 235 U. S. 440; 62 L. E. 385.

This case does not fall within the principle upon which certiorari was granted in National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206, 84 L. E. 704, and National Labor Relations Board v. Express Publishing Company, 312 U. S. 426, 85 L. E. 930.

We submit petitioner has not carried the burden resting upon it of showing in what respect the decision complained of is erroneous.

Beechnut Packing Company v. Federal Trade Commission, 257 U. S. 441, 66 L. E. 307.

Petitioner does not present a case of such peculiar gravity and general importance as to require the consideration of this already over-burdened Court.

The writ should be denied.

Toccoa, Georgia
Gainesville, Georgia

Clifton W. Brannon,
A. C. Wheeler,
Attorneys for respondent,
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On the Brief:
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Toccoa, Ga.

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BRIEF FOR LeTOURNEAU COMPANY OF GEORGIA

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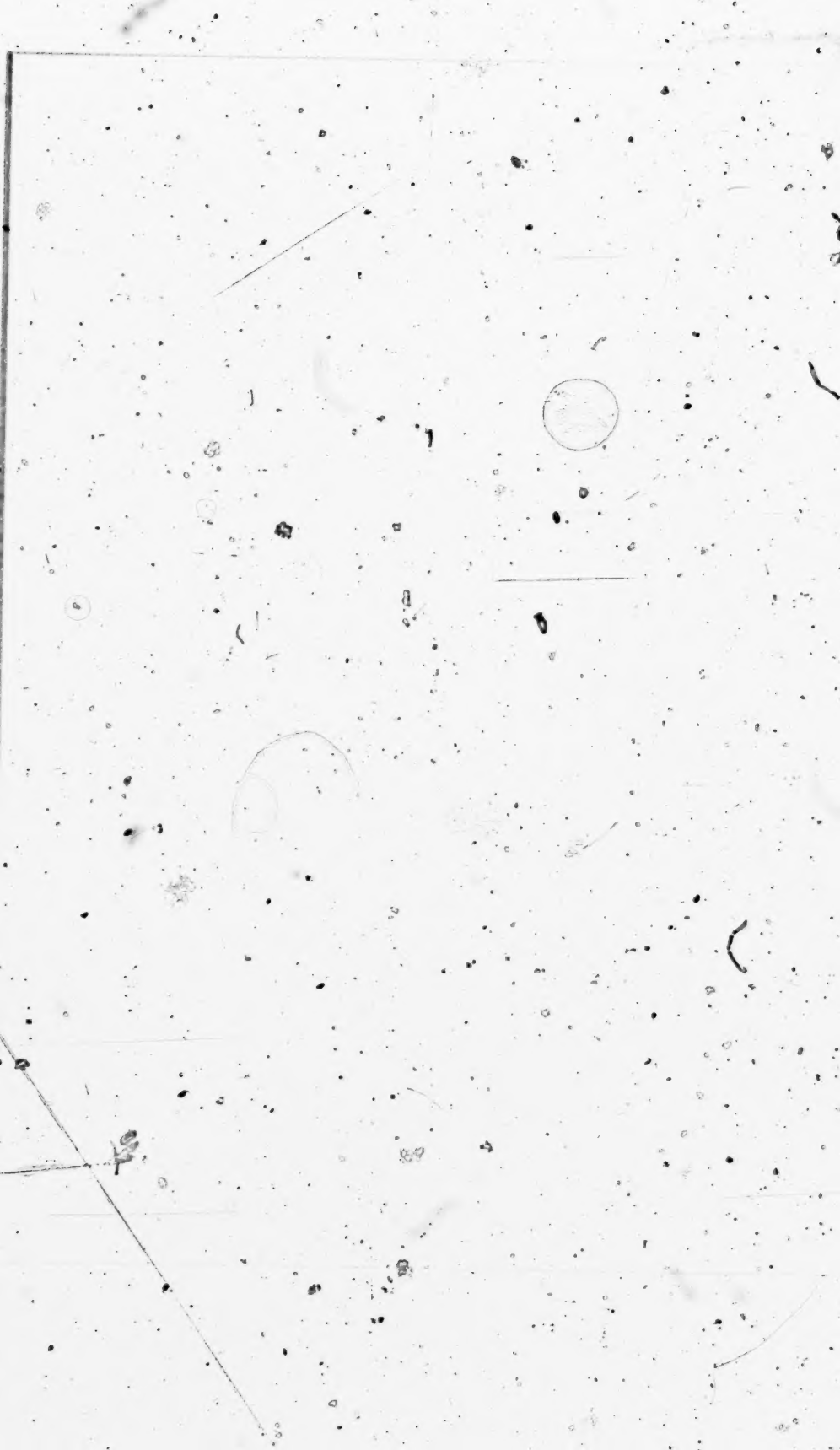

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BRIEF FOR LeTOURNEAU COMPANY OF GEORGIA

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 91-93) is reported in 143 Fed. (2d) 67. The findings of fact, conclusions of law and order of the Board (R. 33-46) are reported in 54 N. L. R. B., 1253.

JURISDICTION

The decision of the Circuit Court of Appeals was rendered June 23, 1944. (R. 94). The jurisdiction of

this Court has been invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and §§ 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

We do not think the statement under the above heading, page 2 brief for the National Labor Relations Board is a fair statement of the question presented in this record.

A more accurate statement of the question for decision would be:

Does employer's rule prohibiting distribution or posting of handbills, posters, or literature on employer's property without permission of personnel department, when impartially enforced long before union activities began, and applied to prohibiting distribution of all literature, including union literature, only in plant and on two adjacent parking lots outside of plant enclosure and not eleswhere, where lots are graded and surfaced, guarded and serviced by employer, the same as area in plant enclosure, violate National Labor Relations Act, when not designed to impede organization and not discriminatorily applied?

STATUTE INVOLVED

The pertinent provisions of National Labor Relations Act, U. S. C. A. Title 29, § 151, et seq. are set out in the appendix of this brief.

STATEMENT

Because the statement under the above heading page 2 brief for National Labor Relations Board omits material portions of the record necessary to a proper decision of this case, it is deemed necessary to state:

Upon a charge of United Steelworkers of America CIO, the National Labor Relationns Board filed its complaint against LeTourneau Company of Georgia charging it with having engaged in unfair labor practices.

> In substance the Board charged; that on or about April 8, 1943, respondent suspended Grady Ferguson for two days and on or about July 16, 1943, it suspended L. Wayman Ayers for two days because said Ferguson and Ayers had been distributing literature published by the Union outside the plant premises and because they had joined and assisted the Union and engaged in concerted activities with other employees for their mutual aid and protection.
>
> That on or about August 11, 1943, respondent prohibited the bringing of union literature into its plant although it permitted other literature to be brought in.
>
> It was charged that these acts were a discrimination in regard to the hire or tenure or terms or conditions of employment of Fer-

guson and Ayers and discouraged membership in the Union and amounted to an unfair labor practice within the meaning of § 8, subdivision (3) of the Act.

That by the acts referred to respondent interferred with, restrained and coerced, and was restraining and coercing its employees in the exercise of rights guaranteed in § 7 of the Act, and was thereby engaging in an unfair labor practice within the meaning of § 8, subdivision (1) of the Act.

That these acts constituted unfair labor practices within the meaning of § 8, subdivisions (1) and (3) and § 2, subdivisions (6) and (7) of the Act. (R. 8-9-10-11).

Respondent filed its answer, conceded that it was subject to National Labor Relations Act; but denied doing anything amounting to a violation thereof and set up that these men were suspended for violating a rule against distributing literature on two parking lots. (R. 14-15).

The evidence of Ferguson showed that he knew he was not supposed to distribute literature at that place. (T. R. Vol. 2; 82).

The evidence of Ayers showed that he had gone to the Superintendent requesting permission to distribute the literature by posting on bulletin boards of the plant and placing it on the parking lots.

Permission was declined, and on some question arising with respect to the extent of the Company's property on the outside, he was referred to the Captain of the Guards as to the extent of the property, but without seeking this information he proceeded, in direct violation of the rule, to distribute literature. (T. R. 2 Vol. 42-43).

Respondent was engaged in the manufacture of shells, essential war materials for use by the Government and employed twenty-one hundred people. The safety of its employees as well as efficient operation required strict supervision over its plant and two parking lots which it had graded and surfaced for the parking of automobiles of its employees. After the grading and surfacing of the two parking lots experience showed that three or four days a week, sometime oftener, merchants would send fourteen or fifteen year old boys to put out handbills, advertising their wares. They would throw papers in the cars, if open, if not they would hang four or five on the handles, put them under windshield wipers and on the outside of the cars and these would blow all over the lots. (See evidence taken before Trial Examiner, page 138).

One of the parking lots was between the plant and U. S. Highway No. 13, about 150 feet in length, 75 to 100 feet in width and paved with cement or concrete paving, it was separated from the highway by a string of railroad rails upon posts well anchored in the ground in order to force cars to go in at one end and park in an orderly manner. The other parking

lot was just across Highway No. 13 from the plant and was enclosed by a heavy wire, strung on iron posts, well anchored in the ground and it was surfaced with old brick and a layer of sand after having been drained so as to make it an all-weather parking space and so arranged as to require automobiles to enter at one entrance to promote orderly parking. These two lots were for the use of employees in parking some 300 automobiles. (See evidence before Trial Examiner, page 102).

After they were constructed and the employees began to use them for parking their automobiles, there was pilfering and stealing of articles out of the automobiles. To use the language of the Captain of the Guards, these thefts included "everything from a camera to cigaretts, lunches, spare tires, tools, jacks," etc., even one of the automobiles was stolen. (Evidence before Trial Examiner, page 137).

As a result of the excessive advertising material accumulating on the lots, the thefts from employees automobile, and because the Company was engaged in the manufacture of essential war materials, strict supervision over these two parking lots as well as the plant proper was essential.

As far back as July 3, 1941, long before Union activity occurred at respondent's plant, and without any thought of in any way affecting a labor union, or the freedom of its employees, respondent promulgated a rule prohibiting distribution of literature of any

kind in the plant and on the plant premises without permission from the personnel department.

This rule was posted on the bulletin boards July 3, 1941, and there was no effort to organize respondent employees by the CIO until in February, 1943, (R. 38).

On April 1, 1943, after the CIO came on the scene attempting to organize respondent's employees and an election was arranged for April 8, 1943, to determine whether the employees wanted to be represented by the Union, respondent posted a notice in its plant dated April 1, 1943, addressed to all employees to the effect:

> "This company desires to inform each of its employees of a definite fixed policy which it does and will adhere to.
>
> Any statement or rumors by any persons contrary to the policy stated herein are without authority and are hereby repudiated.
>
> The employees of this company have the right to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and this company will not interfere with, restrain, or coerce any employee in his or her exercise of these rights.
>
> The company will not undertake or permit any interference, aid or restraint of its

employees in the exercise of their right of self-organization and concerted activities for the purpose of collective bargaining or other mutual aid and protection mentioned above.

This company does not neither will it discriminate in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization.

This company seeks at all times to be ready and willing to co-operate with our employees, or their representatives, for the mutual benefit of our company, our employees, and our country.

LeTOURNEAU COMPANY OF GEORGIA
JACK SALVADOR
Vice Pres.-General Mgr."

(R. 43-44).

In the election the Union lost, but it continued its effort to organize respondent's employees. (R. 38).

The evidence showed without conflict that the rule against distribution of literature was not designed to prevent the organization of the employees, and that it was not discriminatorily applied.

At the conclusion of the evidence counsel for respondent moved to strike the allegations in the complaint to the effect that the Company had prohibited the bringing of Union literature into its plant, though

it permitted other literature to be brought in, because there was no evidence to support this allegation. This motion was granted without objection upon the part of either the Union or counsel for the Board. (R. 49).

Counsel for respondent also moved to dismiss the entire complaint. (T. R. Vol. 2, page 203).

The Trial Examiner reserved a ruling on the motion at the time, but subsequently granted the same and recommended to the Board that the complaint be dismissed. (R. 28-29-35).

After reviewing the intermediate report the Board reversed the descision of the Trial Examiner and although it found that respondent had not discriminatorily applied its no-posting-no-distribution of literature as against Ferguson and Ayers, as charged, nevertheless, because it was held that the rule itself, when enforced on two parking lots amounted to a violation of National Labor Relations Act and the Board thereupon issued a desist order, which LeTourneau Company of Georgia contended was entirely without support in the evidence, much broader than the charges made would permit.

The Company filed its petition with United States Circuit Court of Appeals, Fifth Circuit, to review and vacate the Board's order, contending that the rule in question was both legal and necessary because:

(a) It employed more than two thousand people many of whom came to their work in privately owner motor vehicles;

(b) It graded and surfaced - - - - two parking lots for the use of these employees, where they daily parked between two and three hundred automobiles in which was left lunches and other personal property of said employees for the protection of which it became necessary to employ guards in order to prevent pilfering and stealing of the personal belongings of the employees and to keep the lots free from litter;

(c) The rule was enforced from July 3, 1941, and there was no effort to organize a Union at petioner's plant until February, 1943;

(d) There was an election held under the direction of National Labor Relations Board on the question of whether the Union would be adopted, the result of which was more than two to one against the Union;

(e) If petitioner was forced to allow distribution of Union literature in its plant and on its two parking lots, then it could not rightly deny to other members of the public and its other employees the right to distribute other literature, including that advocating a no-union, and this would create discord and deny its employees the protection afforded by the guards;

(f) Such an order as entered by the Board would deprive petitioner of its property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States and if § 2 (6) and (7) of he National Labor Relations Act - - - be

so constructed as to empower the National Labor Relations Board the right to order petitioner to permit the distribution of literature of any kind in its plant and on said two parking lots, then the Act is contrary to the Constitution, and null and void. (R. 3-4).

The Board filed its answer to that petition and after a general denial of the attacks upon the validity of its order, it asserted the validity of the order and asked the Court to enforce the same. The Circuit Court of Appeals sustained the petition of LeTourneau Company of Georgia and vacated and set aside the order of the Board, and it is this judgment that petitioner for certiorari seeks to have set aside.

LeTourneau Company of Georgia now contends that the judgment or order of National Labor Relations Board was illegal, null and void for all of the same reasons set forth in its petition to review the same and particularly as specified in paragraph 7. (R. 3).

The proof showed without conflict, and the Board found as a fact that on July 3, 1941, the respondent had promulgated a rule which provided in part " - - - no merchant, concern or individual, or individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on company property without first securing permission from the personnel department." (R. 37).

It also found " - - - - - it is uncontradicted in the record that since July 3, 1941, the plant protection

force has strictly enforced a no-distributing-no-posting rule on the respondent's premises, including the two parking lots. There is no evidence that either outsiders or employees have been permitted to distribute literature of any kind on the lots since that time." (R. 38).

The Board also found:

> "The record - - - - is free from dispute as to the material facts. There is disagreement, however, as to what inferences may properly be drawn from the facts. The Board's attorney contends that they show a discriminatory application of the rule against distribution to Ferguson and Ayers, because of their Union activities; the respondent denies any such discrimination. At the oral argument before the Board, counsel for the Union conceded that there was no basis in the record for a finding of a discriminatory application of the rule by the respondent. - - - - We are of the opinion and find, as did the Trial Examiner, that the record does not support a charge that the rule was discriminatorily enforced against Ferguson and Ayers. It is undisputed that the rule against distribution has been applied to all persons, without exception, seeking to distribute literature on the parking lots where Ferguson and Ayers were apprehended." (R. 40).

We submit that in view of these findings the charge as filed against respondent by the Board as

set out in paragraphs 5, 6, 7, 8, 9, 10 and 11 (R. 10-11), were not supported by the evidence and under the evidence and the law a finding that the charges should be dismissed was demanded.

The Board said there was a broader issue whether a rule prohibiting the distribution of union literature by employees in areas outside of the plant proper, although on company property, is in itself repugnant to the Act, under the circumstances of this case. (R. 40).

After calling attention to the rule requiring an evaluation of conflicting rights, the Board then said:

> "In view of the foregoing well-established principles, THE SOLE QUSTION CONFRONTING US IS WHETHER, UNDER THE CIRCUMSTANCES OF THE INSTANT CASE, TO THE EXTENT THAT THE RULE PROHIBITS DISTRIBUTION OF UNION LITERATURE BY EMPLOYEES ON THE PARKING LOTS, IT CONSTITUTES SUCH A SERIOUS IMPEDIMENT TO THE FREEDOM OF COMMUNICATION WHICH IS ESSENTIAL TO THE EXERCISE OF THE RIGHT TO SELF-ORGANIZATION, THAT THE RIGHT TO SELF-ORGANIZATION MUST BE HELD PARAMOUNT, AND THE RULE GIVE WAY." (Capitalization ours).

It is pointed out that not a single witness was introduced to testify that efforts were made and

thwarted to distribute literature any where on any of the premises other than in the plant and on these two small parking lots, which form a substational and essential part of the facilities for carrying on respondent's business. We point out that there was no hint in the charge as made by the Board against respondent, (Paragraphs 5-6-7-8-9-10-11, R. 10-11), that respondent had violated the Act by the promulgation of the rule but the sole charge was that the rule had been discriminatorily applied against Ferguson and Ayers. Not until all the evidence was in and the case was argued was respondent ever put on notice that the Board would make any such contention as it now advances as a reason for its order. It offered no evidence by any witness to show that the Union's right to self-organization was seriously interfered with by the enforcement of the rule. It simply sought to predicate its order on its own peculiar knowledge with respect to industrial plants and industrial organizations and proof of the location of the plant, the basis for its order.

In substance the proof in the way of evidence in the record is that this plant was located in Tournapuli about three miles northeast of Toccoa, Georgia. (T. R. Vol. 2, page 11).

There are about fifty dwelling houses. It has a United States post office and a gasoline station.

For the sake of accuracy we quote the following questions and answers:

"Q. Now, do you know how much propr-erties the LeTourneau Company owns around this plant there?

A. Something like 6,000 acres.

Q. Does that include the property owned by the Louise Farming Company?

A. Yes.

Q. That is a subsidiary of the LeTourneau Company?

A. Yes. - - - -

Q. Is there any other road between Toccoa and Tournapull?

A. Yes. There is the extension of Tugalo Street which goes out by the airport and ends up at Highway 13 at the plant." (T. R. Vol. 2, page 13).

This is a fair statement of all evidence pertaining to the location of the plant and we submit it falls far short of forming a basis for the Board's statement that this plant is located in the heart of 6,000 acre tract of land. On the contrary, from this evidence, and from the further testimony of L. Wayman Ayers, (T. R. Vol. 2, page 43), that even the superintendent did not know just how far the Company's property extended out from the plant, and the fact that the

town is located within three miles of Toccoa and one of its streets extends into it, it would be perfectly consistent with the evidence to say that the plant was within a stone's throw of the line of the Company property, and that a new subdivision of homes to which the City of Toccoa was authorized by a special Act of the Georgia Legislature, Georgia Laws 1941, page 1774, to extend its water mains and service to private owners, was very near to the plant and that a majority of the employees lived either in Toccoa or in those homes. This Court is bound to take judicial notice of the Act above referred to.

The evidence as to where they lived is:

"Q. Where do most of the employees that you have out there at Tournapull live?

A. Most of them live in Toccoa and surrounding cities.

Q. And within a radius of how far of Tournapull do they live; do you have any idea?

A. The majority of them live within twenty miles.

Q. They live in Toccoa, Cornelia, and various other small towns around here and on farms in that neighborhood, is that correct?

A. That is correct."

This is the evidence in substance on the location of the property and the residences of the employees and we submit it furnishes no basis for the finding by the Board that this rule was in itself under these circumstances, a violation of the Act, in view of the fact that the Board expressly found that it was not discriminatorily applied as to the two employees.

SUMMARY OF ARGUMENT

The charge made against respondent by the Board (R. 10-11) is not broad enough to include a finding by the Board that the respondent had violated the Act by enforcing its rule in view of the finding of the Board that respondent was not guilty of the specific act made in the charge.

Although the Board is vested with exclusive jurisdiction to determine a disputed issue of fact and to draw such inferences as may be legitimately drawn from facts actually proved, it is not within the power of the Board to substitute its knowledge of industrial conditions for substantive evidence, and it cannot enter an order against respondent in this case without having before it substantial evidence to show that the application of the rule in question had materially interferred with the right of self-organization.

The statement in the Board's finding, (R. 42) that "distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is

consequently seriously impeded" is not only without support in the record, but is contrary to the positive, uncontradicted testimony, delivered by the witness Haynes, (R. 49) (T. R. Vol. 2, 171 to the effect that no attempt to interfere with the distribution of union literature out on or near the highway immediaely in front of the plant was ever made and that this distribution went on and that it had been handed to him at that point, and the further testimony of George M. Stokes, that the rule had never been applied to any area outside of the plant and parking lots and that the streets and roads leading to the houses at Tournapull were open to anybody that wanted to use them. (R. 49) (Vol. 2, T. R. 236-237).

There was a service station just across the highway from the plant, Vol. 2, T. R. 133-134), which furnished an ideal place for the distribution of such literature as well as the cafeteria and the post office, and the Trial Examiner found as a fact "yet other ways of disseminating union literature are not foreclosed and other means of organizing are not barred by the rule." (R. 28).

LAW APPLICABLE

Section 7 of the Act, 49 Stat. 452, U. S. C. A. Title 29 § 157, give to employees the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. With this we make no issue

but our contention is that we have not in any way violated the terms of this Act, and the Board by its findings with reference to the specific charges contained in record so found.

It must not be overlooked that in February, 1943 the Congress of Industrial Organizations, commenced to organize respondent's employees. An election was held April 8, 1943 resulting in the defeat of the CIO, but it continued its effort to organize these employees. (R. 38). In this situation the effort to establish the union as a bargaining agent was progressing and respondent was under a strict and unavoidable obligation to be absolutely impartial and neutral between the members of the Union and the other employees though the Union had lost the election by a vote of more than two to one. We submit therefore that learned counsel's comment on respondent's claim that if by the Board's order it was compelled to admit the distribution of Union literature in the plant and on the two parking lots, it could not rightfully deny to other members of the public and other employees the right to distribute other literature (P. 30 Mr. Fahy's brief), is not well taken, since under the National Labor Relations Act "employer must maintain a total, complete and honest neutrality." Elastic Stop Nut Corporation v. National Labor Relations Board, 142 F. 2d 371 (19?, " - - - - the National Labor Relations Act imposes upon an employer total and complete impartiality and the utmost of honest neutrality, since even slight suggestion as to employers choice between an outside or inside union may have telling effect and constitute powerful support." National Labor Relations Board

v. Faultless Caster Corporation, 135 F. 2d 559 (3). If such sligh suggestion as to choice between an outside or inside union would as the case cited seems to hold constitutes an unfair labor practice, then such slight suggestion would certainly be likewise objectionable when the choice lay between union members representing less than one-third of the employees and the other employees who were opposing the union by their ballots. If respondent is bound to allow a minority of its employees to distribute union literature on its parking lots, we reiterate it could not rightfully without taking sides deny to the majority of its employees the right to distribute thereon non-union literature and this would bring about the very condition the Act was designed to prevent.

The language of paragraph 2 § 8, 49 Stat. 452, U. S. C. A. Title 29, § 158, not only makes it an unfair labor practice for the employer to dominate or interfere with the formation or administration of any labor organization, but it forbids the employer to "contribute **financial or other support to it.**"

THE RULE WAS NOT INVALID

In Carter Carburetor Corporation v. National Labor Relations Board, 140 F. 2d 714, the rule under consideration was:

> "The solicitation, oral or written, of membership in any union on company property or time is prohibited. A violation of this rule will be considered grounds for dismissal."

In that case the Court held the rule "may not be objectionable as a regulation for the conduct of business."

In Midland Steel Products Co. v. National Labor Relations Board, 113 F. 2d 800, the Court in the course of the opinion said:

> "The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets, intense discussion before work has commenced or in the noon hour, may reasonably be expected to carry a certain animus over into work hours. If the rule against solicitation is reasonable, the fact that it is applied to soliciting for union membership does not relieve the employee of his obligation of obedience."

See in this connection National Labor Relations Board v. Williamson-Dickie Mfg. Co., 130 F. 2nd 260 (CCA5); National Labor Relations Board v. Denver Tent & Awning Co., 138 F. 2nd 410 (CCA-10); Boeing Airplane Co. v. National Labor Relations Board, 140 F. 2d 423 (CCA-10).

In National Labor Relations Board v. El Paso Electric Co., 133 F. 2d 168 (CCA-5), the company had

a rule of long standing requiring that employees should not display union insignia, and the Court held that the continued indiscriminate enforcement of this pre-existing rule did not deny rights of employees of National Relations Act.

EMPLOYER HAS RIGHT TO SUSPEND EMPLOYEE WITH OR WITHOUT CAUSE SO LONG AS THIS IS NOT DONE FOR UNION ACTIVITIES

"So far as the National Labor Relations Act goes an employer may discharge, or refuse to re-employ for any reason, just or unjust, except discrimination because of union activities and relationships. National Relations Act, 29 U. S. C. A. § 151, et seq".

National Labor Relations Board v. Tex-O-Kan Flour Mills Co., 122 F. 2d 433 (15).

"It is unnecessary for an employer to justify the discharge of an employee so long as it is not for union activities".

National Labor Relations Board v. Union Mfg. Co. 124 F. 2d 332, (2) (CCA-5).

"The National Labor Relations Act of 1935 (49 Stat. at L. 449, Chap. 372, 29 U. S. C. A. § 151) does not interfere with the normal exercise of the right o fan employer to select his employees or to discharge them, so long

as he does not under cover of that right intimidate or coerce his employees with respect to their self-organization and representation."

National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U. S. 1; 81 L. ed 893 (18).

It is clear that an employer may hire and fire at will so long as this is not based upon antagonism to union membership or self-organization. National Labor Relations Board v. Bluebell Globe Co., 120 F. (2d) 974. Since the Board itself found that the rule was not discriminatorily applied against Ferguson and Ayers, it follows that it was without power to make the order entered by it.

BOARD HAD BURDEN OF PROVING VIOLATION OF ACT

In Stonewall Cotton Mills, Inc. v. National Labor Relations Board, 129 F. (2d) 629, at page 632, it was said:

"It must too always be kept in mind that the burden was on the board as accuser, under § 8 (3), in order to establish the facts authorizing itself as judge to find that persons were laid off in violation of it and to require their reinstatement, to show not that they were laid off without sufficient excuse, or even that they were laid off because of antipathy against

them because of their union activity, but that their laying off was, the unfair labor practices denounced by § 8 (3) - - - - to encourage or discourage membership in a union".

The presumption is that an employer has not violated the Act—the burden of proof is not upon the employer, but upon the one who asserts the fact to prove that the discharge was because of union activities. National Labor Relations Board v. Union Mfg. Co., 124 F (2d) 332 (3) (CCA-5).

"The Act does not interfere with the normal exercise of a right of the employer to select its employees or to discharge them. The employer may not, under cover of that right intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the board is not entitled to make its authority a pretext for interference with a right of discharge when that right is exercised for other reasons than such intimidation and coercion".

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed 893.

"The company does not have to prove non-discrimination because of union activities. The Board **must** (underscoring ours) prove discrimination because thereof. This burden of the Board to prove discrimination

and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board".

Interlake Iron Corp. v. National Labor Relations Board, 131 F. (2d) 129, 132 (8) (CCA-7).

The findings of the National Labor Relations Board, to be conclusive, must be supported by substantial evidence—this means more than a mere scintilla, and is such evidence as a reasonable mind might accept as adequate to support a conclusion. International Brotherhood of Electrical Workers v. National Labor Relations Board, 305 U. S. 197; 83 L. ed. 126.

In conclusion we submit there was not even a scintilla of evidence offered to show that the suspension of Ferguson and Ayers discouraged Union organization or activity. There was no substantial basis for finding that the application of respondents no-posting-no-distribution rule was done to encourage or discourage membership in a union or that it interfered with the employees right to self-organization to any material extent. On the other hand, the evidence of Haynes (R. 49) was uncontradicted that there was no interference with the distribution of Union literature near the highway immediately in front of the plant, and that this absolutely went on. That he himself had had it handed to him in a bus and a car. See also testimony of George M. Stokes (R. 49 Tr. Vol. 2

p. 236-237). No one testified in behalf of the Board or the Union that the suspension of Ferguson and Ayers discouraged or interfered with the Union, or that it materially interrupted the distribution of literature among the employees. The Board could not substitute its expert judgment on matters pertaining to industry for substantive evidence. Its order was illegal, without any support of evidence in the record, the judgment of the Circuit Court of Appeals was correct and the only legal judgment that could have been rendered, and should be affirmed.

Respectfully submitted,

Toccoa, Ga. C. M. McClure

Toccoa, Ga. Clifton W. Brannon

Gainesville, Ga. A. C. Wheeler

Wheeler, Robinson & Thurmond

Attorneys for Respondent.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. Sec. 151, et seq.) are as follows:

Sec 1.

— — — — —

It is hereby declared to be the policy of th United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedue of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

— — — — —

Sec. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing , to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial **or other support to it**; - - - - - (underscoring ours).

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; - - - -

— — — — —

Sec. 10.

— — — — —

(c) - - - If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findigs of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affimative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. - - -.

— — — — —

(e) - - - The findings of the Board as to the facts, if supported by evidence, shall be conclusive. - - - - -.

No. 452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

LETOURNEAU COMPANY OF GEORGIA.

PETITION FOR REHEARING.

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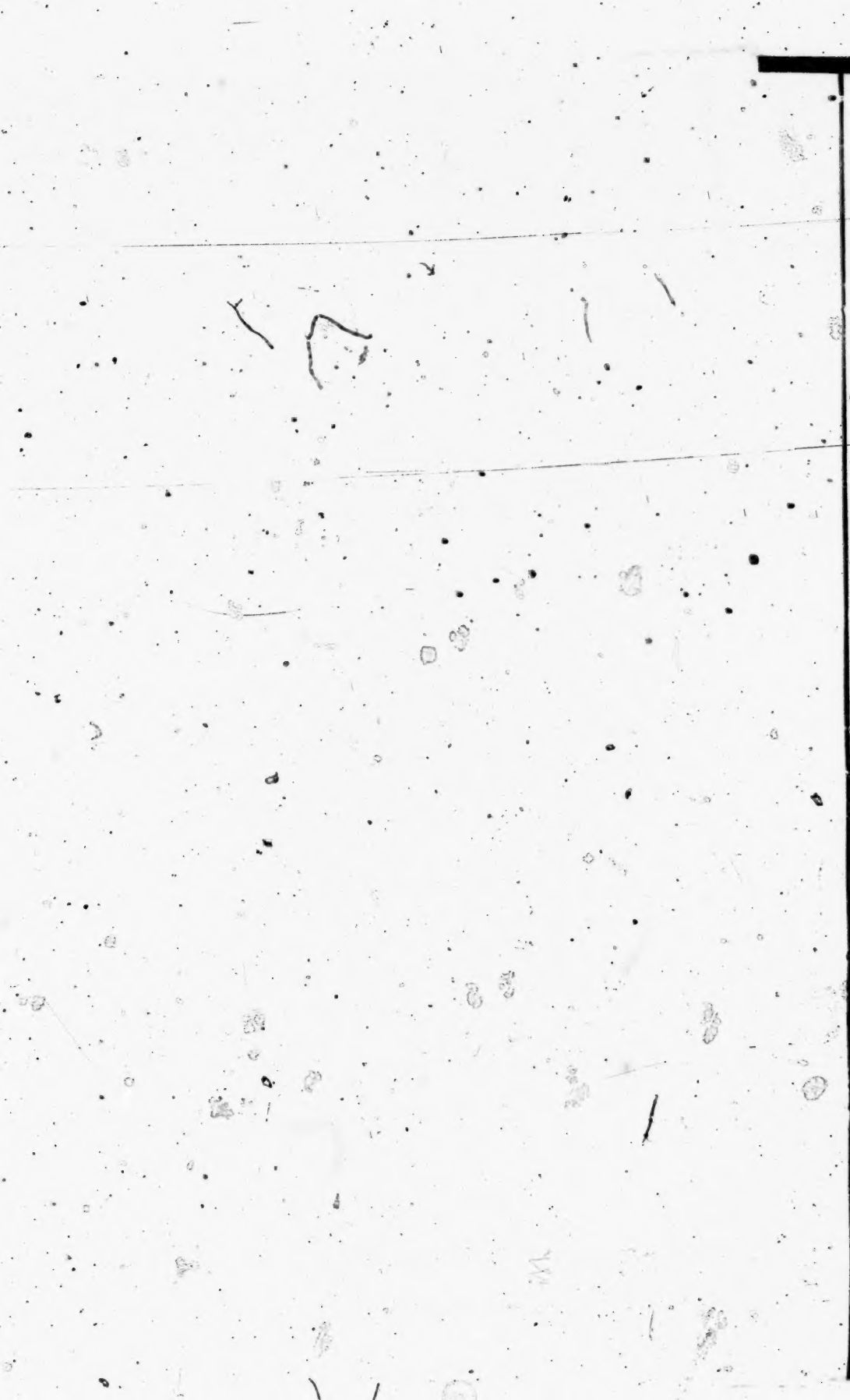

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v.

LETOURNEAU COMPANY OF GEORGIA.

PETITION FOR REHEARING.

To the Supreme Court of the United States and the Justices thereof:

Comes now LeTourneau Company of Georgia, respondent in the above-entitled cause, and presents this its Petition for Rehearing, and in support thereof respectfully shows:

I.

Preliminary Statement.

This cause was decided by this Court April 23, 1945, in a joint opinion with *Republic Aviation Corporation* v. *National Labor Relations Board* No. 226. On May 11, 1945,

Mr. Justice Reed issued an order in this cause extending the time within which to file a Petition for Rehearing to and including May 25, 1945.

II.

Under This Opinion Employers are Unreasonably Deprived of Their Right to Protect Property.

The effect of this decision in the *LeTourneau* case, whether intended or not, is to strike down almost any and every rule, howsoever reasonable, adopted by industry for policing its property and that of its employees. Up to now employers had the assurance, so long as they avoided discrimination against union activity, that they were free to adopt and enforce reasonable regulations necessary to protect such property. By virtue of the decision concerning which rehearing is requested, employers no longer have this assurance.

III.

The Joint Consideration of the LeTourneau Case with the Republic Case was Prejudicial to Respondent.

The rule in the *Republic* case provided:

> "Soliciting of any type cannot be permitted in the factory or offices."

The rule enforced in the *LeTourneau* case was as follows:

> "In the future no Merchants, Concern, Company or Individual or Individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on Company property without first securing permission from the Personnel Department."

It is respectfully urged that respondent's case was considered in an unfavorable light and without adequate regard for the particular facts and circumstances pertaining to it by virtue of the commingling of the two cases which

are fundamentally dissimilar. Throughout the opinion the *Republic* and the *LeTourneau* cases are considered alike and as though involving similar controlling facts and principles with the inevitable result that respondent has not had the benefit of completely independent judgment on the special facts and circumstances of its own case.

In the *Republic* case the employer enforced a rule, all-inclusive in character which proscribed *any type of solicitation*. Its very brevity demonstrates its expanse and the fact that it admitted of no exceptions. The rule in the *Republic* case is of such breadth and coverage that it prohibits any and all types of union activity within the plant looking toward the formation of or acquisition of membership in a labor organization. Solicitation, of course, can be by the spoken word, the distribution of printed matter, the wearing of insignia, and indeed by mere gesture. An absolute ban against solicitation such as is involved in the *Republic* case, whether so intended or not, is an effective block and an insuperable barrier to any reasonable effort on the part of an employee or anyone else to interest another in union activity or membership. Such a rule would clearly be violated if during lunch period, at the work bench, in a rest room, or anywhere else on company property a union member inquired of a fellow employee if he would consider joining his union organization, or if he made overtures of any kind with the purpose of attempting to influence him in that direction. Clearly this is an altogether different proposition from the rule considered in the *LeTourneau* case, and the commingling of these two cases by this Court as though they involved comparable facts and principles of law prejudiced respondent's case and put it in a false light.

The *LeTourneau* case involves application of a rule admittedly promulgated for the bona fide purpose of preventing pilfering and littering. As applied it prevented only the distribution and posting of handbills, posters, or other literature, either in the company's plant or in two parking lots maintained and guarded for the benefit of employees.

This rule in no way abrogates the union's right to solicit or carry on organizing efforts in the plant or on the parking lots. It is by no means the type of all-inclusive ban found obnoxious by this Court in the *Republic* case. It does not go beyond the purpose for which it was originated. Solicitation by union organizers is certainly not proscribed thereby. This rule does not prevent word-of-mouth solicitation or discussion concerning organizational matters, the wearing of union buttons, or any other insignia considered useful for the purpose of promoting a labor union or self-organization by employees, and indeed there is nothing in the rule which would prevent the making of public speeches by union organizers or even the use of loud-speakers on the very premises where the rule against littering and pilfering was enforced. These facts and circumstances, we submit, are entirely unrelated to the all-inclusive "No Solicitation" rule involved in the *Republic* case, and the Court's consideration of the two cases as though they related to the same thing was erroneous and prejudicial to a fair consideration of the *LeTourneau* case.

IV.

The Court Erred in Presuming Respondent Guilty of Unfair Practices in the Absence of Special Circumstances.

The Court erred in relying on the presumption that once the basic facts were proven the employer was guilty of an unfair labor practice under the provisions of the National Labor Relations Act in the absence of evidence by the employer overcoming or rebutting this presumption. In its decision in this case, the Court, after finding that the employer had in good faith and with non-discriminatory purposes promulgated and enforced the rule against distribution and posting of handbills, posters, or any literature, found that it could not * * *

> "* * * properly be said that there was evidence or a finding that the plant's physical location made solici-

> tation away from company property ineffective to reach prospective union members. Neither of these (referring to the *Republic* and the *LeTourneau* cases) is like a mining or lumber camp where the employees pass their rest as well as their work time on the employer's premises, so that union organization must proceed upon the employer's premises or be seriously handicapped."

In other words, the Court has clearly held that in adopting and applying the rule against distribution the company acted in good faith and that there was no proof of any special circumstances indicating that the adoption of the regulation would result in discrimination against union organization and activity. In spite of this, the Court found that the mere adoption of the rule violated the Act.

Under these circumstances, the National Labor Relations Act does not create or permit the creation of the presumption that the employer's conduct constitutes an unfair labor practice. The Court has erroneously placed the presumption of guilt on the employer from the mere recital of the basic facts, and has held the employer guilty of unfair labor practices, not because of the presence of special circumstances showing discrimination but because of the alleged absence of special circumstances proving non-discrimination. The Court said:

> "The *LeTourneau Company of Georgia* case also is barren of special circumstances."

We believe that in reaching this conclusion the Court has erred both in law and fact. We respectfully urge that the presumption of innocence must attend the promulgation and operation of the rule, and that even if this were not so special circumstances of a controlling nature showing non-discrimination are contained in the record in this case.

Under the authorities it is clear that the presumption of non-violation obtains and the burden is on the accuser to prove discriminatory effect. If the statute required a con-

trary result, to that extent it would violate the Fifth Amendment to the Constitution. This Court in *Western and Atlantic Railroad* v. *Henderson, et al.*; 279 U. S. 639, 642, in dealing with a state enactment, said:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

The Courts have uniformly agreed that the Act does not permit of the creation of a presumption against the employer; rather the presumption is that the employer has not violated the Act. *National Labor Relations Board* v. *Union Manufacturing Company*, 124 F. (2d) 332; *Interlake Iron Corporation* v. *National Labor Relations Board*, 131 F. (2d) 129. In the latter case at page 134 the Seventh Circuit Court said:

> "The company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board."

Something entirely different was involved in the *Peyton Packing Company* case, 49 N. L. R. B. 828, referred to by the Court in its opinion. There the Board with propriety held that while it was presumed that a rule prohibiting union solicitation during working hours is valid in the absence of evidence shewing a discriminatory purpose, the contrary would be presumed where the employer promulgated and enforced a rule prohibiting union solicitation by an employee outside of working hours although on company property. Implicit in the adoption of such a rule is a purpose to discriminate against proper union activity

whether such purpose was intended or not in the promulgation of the rule. However, by no stretch of the imagination is this the *LeTourneau* case nor does the rule resemble that which is the subject of attack in the instant case. It having been found that the *LeTourneau* rule was adopted for a valid non-discriminatory purpose, the respondent should not be found guilty of discrimination on a record barren of even a scintilla of evidence that the actual adoption and application of this rule did in fact discriminate.

V.

In any Event the Record is Replete with Evidence of Special Circumstances Showing Non-Discrimination.

However, in any event the record is replete with proof of facts and special circumstances showing that the rule was not discriminatory and which completely rebut such a presumption, if it can be indulged in any case. Having approved the Board's application of a presumption that the enforcement of this rule against circulation of union literature on the two parking lots was a violation of Section 8 (1) and Section 8 (3) of the Act this Court then proceeded on the assumption that the record was barren of special circumstances which conceivably would have overcome the presumption. This error is manifest by the statement found in the Court's opinion to the effect:

> "• • • There is one hundred feet of company-owned land for parking or other use between the highways and the employee entrances to the fenced enclosures where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, buses, or other conveyances on the public roads for communications. The employees' dwellings are widely scattered."

There are other facts, apparently not considered by the Court, which do overcome and rebut such presumption, if it should be indulged at all. Some of these are:

1. Practically all of the employees enter and leave the company's plant through a main gate approximately 100 feet from the intersecting highway. All employees, including the 800 referred to by the Court who worked in the foundry, enter and leave the main gate and punch a time clock located just inside the gate. (R. p. 56, 58). Aside from the opportunity openly to solicit and other means afforded union workers to distribute literature to the company's employees, they had the opportunity to hand out their literature to employees just before they entered this gate as is conclusively shown by the testimony of the witness Haynes, who in reply to the question "—has the Company within your knowledge attempted to interfere with the distribution of Union literature out on the highway, or near the highway immediately in front of the plant?"—said: "No, there has been no interference with that. That goes on, absolutely." And further stated: "I have been in the bus or in a car when it was handed out, yes, without any interference or restriction whatsoever at that point." (R. p. 49).

2. There was no rule against solicitation and the rule against distribution of literature was not applied to any area outside of the plant and the two company-maintained parking areas. (R. p. 49).

3. Available at all times to union organizers for the distribution of their literature was the United States Post Office located within the very heart of the premises. (R. p. 54).

4. Distribution of literature was unrestricted at a gasoline filling station directly across the highway from the plant and adjacent to the south parking lot. (R. p. 49, 54).

5. Prior to the adoption of the rule and at a time when there was no union activity at the plant, a guard was hired by the company to protect its property and the property of its employees. That guard requested the promulgation of the rule. (R. p. 80).

6. Prior to its adoption the guard received almost daily reports of thefts of such items as cameras, cigarettes, lunches, spare tires, tools, and jacks from the employees' cars parked on the lot and one complaint involved the theft of an automobile. (R. p. 80).

Surely when consideration is given to these facts and the perfectly valid and reasonable purpose behind the promulgation and enforcement of this rule, especially in view of the fact that it protected the property of the employees, and promoted efficiency, by relieving the minds of such employees while at work from anxiety concerning their belongings, necessarily left in their automobiles, it cannot be said that the rule was improperly restrictive or that it substantially encroached upon any valid right of the employee, or in any way violated any provisions of the Act.

Conclusion.

The conduct of the LeTourneau Company in no sense violates the purposes of the Wagner Act. As this Court has held, the company acted without discrimination toward union organization both in the adoption of its rule and the enforcement thereof. Beyond this the Court has before it affirmative evidence demonstrating that neither the promulgation nor the application of the rule would in fact discriminate against proper union activities. While it may be true that the circumstances in the *Republic* case warranted a finding that the Act was violated, it is respectfully submitted that the facts and circumstances here do not warrant such a finding and that this Court should give independent consideration to the *LeTourneau* case, its facts and circum-

stances, and order rehearing thereon; otherwise, a result entirely foreign to the intentions of the authors of the National Labor Relations Act will be produced.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of this Court be upon further consideration reversed.

Dated: May 25, 1945.

Respectfully submitted,

ALONZO C. WHEELER,
NELSON T. HARTSON,
LESTER COHEN,
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C. M. MCCLURE,
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LeTourneau Company of Georgia.

Of Counsel:
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Washington, D. C.

Certificate of Counsel.

I, Counsel for the above-named respondent, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

NELSON T. HARTSON,
Counsel for Respondent,
LeTourneau Company of Georgia.